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~~1272~~ No. 3538 1273

United States

Circuit Court of Appeals

For the Ninth Circuit.

E. H. STANTON,

Plaintiff in Error,

vs.

J. L. HAMILTON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

FILED
SEP 3 - 1920
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3538

United States

Circuit Court of Appeals

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Names and Addresses of Attorneys of Record.

DANSON, WILLIAMS & DANSON, Paulsen Building, Spokane, Washington,

DON M. KIZER, Hyde Building, Spokane, Washington,

POST, RUSSELL & HIGGINS, Spokane, Washington,

Attorneys for Defendant and Plaintiff in Error.

GRAVES, KIZER & GRAVES, Old National Bank Building, Spokane, Washington,

LEE & KIMBALL, Hyde Building, Spokane, Washington,

W. E. CULLEN, Hyde Building, Spokane, Washington,

Attorneys for Plaintiff and Defendant in Error. [2*]

In the District Court of the United States, in and for the Eastern District of Washington, Northern Division.

No. 3261.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Complaint.

Plaintiff, for his cause of action against the defendant herein, alleges:

I.

That plaintiff is a resident and citizen of Butte, in the State of Montana, and that the defendant is a resident and citizen of Spokane, in the State of Washington.

II.

That the amount involved in this controversy, the subject matter of this action, exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

III.

That for some time prior to the 8th day of May, 1917, and on said day, plaintiff and defendant were stockholders in that certain corporation known as "E. H. Stanton Co.," organized and existing under the laws of the State of Washington, with its principal place of business at Spokane, Washington, with a total capital stock of Six Thousand (6,000) shares. That said corporation was during all of said times engaged in the general business of buying livestock and other meat products, [3] butchering, packing, preserving and selling the same at its plant located at Spokane, Washington. That the plaintiff was induced by the defendant to invest in the stock of said corporation to the extent of 1096⅓ shares, which said stock plaintiff owned on said 8th day of May, 1917. That prior to said date plaintiff had, at the special instance and request of the defendant, as-

sisted defendant in financing said corporation and that the relations then and at all times prior to said 8th day of May, 1917, had become and were very close and confidential and that plaintiff had assisted defendant to his benefit in a financial way in placing said corporation in good financial condition. That the defendant was during all of said times the President of said corporation, and the General Manager thereof.

IV.

That prior to the month of May, 1917, the defendant requested the plaintiff to hold his said stock, consisting of 1096⅓ shares and to refrain from placing the same upon the market or selling the same until such time as the defendant should sell his stock in said corporation, and in consideration of plaintiff's so withholding his stock from the market the defendant represented and promised to the plaintiff that he would advise plaintiff of any opportunity to sell plaintiff's and defendant's stock together, and that he, the defendant, would, without other consideration than the benefit accruing to him, the defendant, therefrom, act as the agent of plaintiff in placing plaintiff's said stock with any purchaser to whom the defendant might desire to sell his stock, and would secure for plaintiff the best price possible and the same price at which he, the defendant, should sell if he concluded to sell his said stock. That in consideration of said representations and promises plaintiff agreed to and did hold his said stock and did depend upon the defendant to place said stock at such price as the defendant should secure for his own stock [4] in the event of an opportunity to sell.

V.

That during the month of May, 1917, without the knowledge or consent of this plaintiff, the defendant contracted to sell his, the defendant's stock, and all the plaintiff's stock to Armour & Co., a corporation, and that the price stipulated in said Contract of Sale for said stock was Two Hundred Twenty Dollars ($220.00) per share. That after the making of said contract between defendant and said Armour & Co. defendant represented to plaintiff that he had an opportunity to sell plaintiff's stock and his, the defendant's stock to Armour & Co., but falsely and fraudulently represented to plaintiff that the price defendant was to receive therefor was Two Hundred Dollars ($200.00) per share. That defendant contracted to sell to said Armour & Co., 5,084⅓ shares of the capital stock of said E. H. Stanton Co., to Armour & Co., at said time, at said price of Two Hundred Twenty Dollars ($220.00) per share, and that said amount or number of shares included plaintiff's said stock.

VI.

That without revealing to plaintiff the terms of said Contract with Armour & Co., or the fact that any such Contract had been entered into, and by falsely and fraudulently stating to plaintiff that the price at which defendant's stock was to be sold and at which plaintiff's stock was to be sold was the sum of Two Hundred Dollars ($200.00) per share, defendant induced plaintiff to sell his said stock to Armour & Co., as he supposed, for the sum of Two Hundred Dollars ($200.00) per share, when in truth and in fact said

sale was made by defendant to said Armour & Co. at Two Hundred Twenty Dollars ($220.00) per share, and that defendant took and received as the proceeds of said sale of plaintiff's said stock the sum of Twenty Dollars ($20.00) per share in excess of the amount paid to plaintiff or accounted [5] for to him by the said defendant. That the plaintiff delivered his said stock to said Armour & Co. or to the defendant for said Armour & Co., and received therefor payment at the rate of Two Hundred Dollars ($200.00) per share, and no more.

VII.

That the plaintiff at all times relied upon the defendant and upon his Contract with the defendant to place and sell plaintiff's stock at the same price which defendant received for his, and that by reason of the false and fraudulent statements and representations of the defendant to plaintiff the plaintiff was defrauded out of the sum of Twenty Dollars ($20.00) per share, which said sum defendant received and retained unlawfully and fraudulently, to plaintiff's damage in the sum of Twenty-one Thousand Nine Hundred Twenty-six and 67/100 Dollars ($21,926.67). That plaintiff did not know the true facts concerning said transaction until after said Contract between defendant and said Armour & Co. had been executed and did not learn the true facts concerning the same until long thereafter. Upon discovery of said facts and of the fraud so perpetrated upon him plaintiff demanded of the defendant that defendant pay over to plaintiff the balance of said purchase price, to wit, the sum of

Twenty-one Thousand Nine Hundred Twenty-six and 67/100 Dollars ($21,926.67), which said demand was by the defendant refused.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Twenty-one Thousand Nine Hundred Twenty-six and 67/100 Dollars ($21,926.67), with interest thereon from and since the 21st day of May, 1917, together with the costs and disbursements of this action.

LEE & KIMBALL,
W. E. CULLEN,

Attorneys for Plaintiff, 505 Hyde Block, Spokane, Wash. [6]

State of Washington,
County of Spokane,—ss.

W. E. Cullen, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the foregoing-entitled action, and makes this verification for and on behalf of said plaintiff J. L. Hamilton, for the reason that said plaintiff is not now within the said State of Washington; that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

W. E. CULLEN.

Subscribed and sworn to before me this 12th day of July, A. D. 1919.

P. W. KIMBALL,
Notary Public, in and for the State of Washington, Residing at Spokane, Washington.

Filed in the U. S. District Court, Eastern District of Washington, July 14, 1919. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [7]

In the District Court of the United States, in and for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Amended Answer.

Comes now the defendant and for an amended answer to the complaint of the plaintiff herein states and alleges:

I.

Admits paragraphs 1 and 2 of said complaint.

II.

Answering paragraph 3 of said complaint, defendant admits that for a long time prior to the 8th day of May, 1917, plaintiff and defendant were stockholders in E. H. Stanton Company, a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Spokane therein, with a capital stock of six thousand shares. Further admits that said corporation was engaged in the general business of buying livestock and other meat products, butchering, packing, preserving and selling the same at its plant located at Spokane, Washington, and that the defendant was the president and general manager of said corporation. Denies that plaintiff owned any other or greater number of shares of the capital stock of the

E. H. Stanton Company than one thousand ninety-six and one-third shares. Denies each and every other allegation, matter and thing contained in said paragraph.

III.

Denies each and every allegation, matter and thing contained in paragraph four of said complaint.

IV.

Answering paragraph 5 of said complaint, defendant denies each and every allegation, matter and thing contained in said paragraph, and by way of explanation, states the fact to be [8] that in the early part of May, 1917, the defendant gave an option on 5,084⅓ shares of the capital stock of the E. H. Stanton Company to a real estate dealer at the price of two hundred twenty ($220.00) dollars per share, and that said real estate dealer attempted to interest Armour & Company, a corporation, in the purchase of said stock at the price and according to the conditions of said option, but said Armour & Company, a corporation, would not purchase said stock at such a price or under the terms of the option agreement.

V.

Answering paragraph 6 of said complaint defendant denies each and every allegation, matter and thing contained in said paragraph, save and except defendant admits that plaintiff sold his stock to Armour & Company for two hundred ($200.00) dollars per share, and further states the fact to be that plaintiff negotiated the sale of his stock to Armour & Company personally and without any representations being made to him by defendant.

VI.

Denies each and every allegation, matter and thing contained in paragraph 7 of said complaint.

For further answer and by way of an affirmative defense herein, defendant states and alleges:

I.

That on or about May 21st, 1917, plaintiff entered into an agreement in writing with Armour & Company, a corporation to sell it all the stock he owned in the E. H. Stanton Company for the sum of $219,366.66, to wit: 1096⅓ shares at $200.00 per share, plaintiff to deposit his stock in the bank of W. A. Clark & Brothers in Butte, Montana, on or before May 25th, 1917, and Armour & Company to deposit the purchase price on or before the same day, said purchase price being part in cash and part in notes of Armour & Company bearing 5% interest and payable respectively, one, two, three and four years after date. That prior to depositing the said stock in said bank plaintiff learned [9] that defendant had made a contract with Armour & Company whereby the defendant would receive from Armour & Company for the stock owned by the defendant and for defendant's guarantee of the accounts of E. H. Stanton Company and for defendant's agreement not to engage in any business carried on by E. H. Stanton & Company in any capacity whatsoever in the four northwestern states for the period of ten years, and for defendant's services to be thereafter rendered to Armour & Company and the E. H. Stanton Company, a sum of money which exceeded by approximately $92,000.00 the sum arrived

at by multiplying by $200.00 the number of shares owned by defendant and his family, to wit 2420⅔ shares, and the plaintiff prior to depositing the said stock in said bank became fully familiar with all the facts in relation thereto, but nevertheless and notwithstanding such knowledge proceeded to and did deposit his said stock in said bank as provided for in his said written agreement.

II.

Subsequent to May 21st, 1917, and before June 1st, 1917, and after acquiring the knowledge referred to in the preceding paragraph, the plaintiff came to Spokane, Washington, and either for himself or for himself and J. E. Hample purchased from one Mabel Overholt 773⅓ shares of the capital stock of the E. H. Stanton Company at the price of $190.00 per share. Armour & Company failed and neglected to deposit in the said banking house of W. A. Clark & Brothers on or before May 25, 1917, as provided in its contract with the plaintiff, the moneys and notes as therein provided, and thereafter and on or about June 2, 1917, the plaintiff went to said banking house and demanded of and received from it the said 1096⅓ shares of stock theretofore deposited by the plaintiff with the said bank, and notified said Armour & Company that he refused to sell said stock to said Armour & Company under said contract, and that the said contract had been obtained by fraud and false representations and through [10] conspiracy between the said Armour & Company and the defendant, whereby the plaintiff was deceived and was to be defrauded, and for those reasons his

said written agreement of May 21st, 1917, was vitiated and of no force and effect, and that he would not carry out the same. Subsequently negotiations were entered into between the plaintiff and Armour & Company whereby the plaintiff sold to Armour & Company the said shares of stock, to wit, those purchased from Mabel Overholt and those originally owned by the plaintiff, amounting in the aggregate to 1869⅔ shares, for the sum of about $391,000.00, or about 16,000.00 in excess of $200.00 per share for all of said stock, and the same was so delivered under said contract and paid for by said Armour & Company.

WHEREFORE, defendant prays that plaintiff take nothing by his action herein and that the defendant recover his costs and disbursements herein expended.

POST, RUSSELL & HIGGINS,
DON F. KIZER,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

E. H. Stanton being first duly sworn deposes and says: That he is the defendant above named, that he has read the foregoing amended answer, knows the contents thereof, and the same is true, as he verily believes.

E. H. STANTON.

Subscribed and sworn to before me this 5th day of April, 1920.

FRED K. JONES,
Notary Public in and for the State of Washington,
Residing at Spokane.

Filed in the U. S. District Court, Eastern District of Washington. April 7, 1920. W. H. Hare, Clerk.
[11]

In the District Court of the United States, in and for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Second Amended Answer.

Comes now the defendant and for an amended answer to the complaint of the plaintiff herein states and alleges:

I.

Admits paragraphs 1 and 2 of said complaint.

II.

Answering paragraph 3 of said complaint defendant admits that for a long time prior to the 8th day of May, 1917, plaintiff and defendant were stockholders in E. H. Stanton Company, a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Spokane therein, with a capital stock of six thousand shares. Further admits that said corporation was engaged in the general business of buying livestock and other meat products, butchering, packing, preserving and selling the same at its plant located at Spokane, Washington, and that the defendant was

the president and general manager of said corporation. Denies that plaintiff owned any other or greater number of shares of the capital stock of the E. H. Stanton Company than one thousand ninety-six and one-third shares. Denies each and every other allegation, matter and thing contained in said paragraph.

III.

Denies each and every allegation, matter and thing contained in paragraph four of said complaint.

IV.

Answering paragraph five of said complaint, defendant denies each and every allegation, matter and thing contained in said paragraph, and by way of explanation, states the fact to be that in [12] the early part of May, 1917, the defendant gave an option on 5,084⅓ shares of the capital stock of the E. H. Stanton Company to a real estate dealer at the price of two hundred twenty ($220.00) dollars per share, and that said real estate dealer attempted to interest Armour & Company, a corporation, in the purchase of said stock at the price and according to the conditions of said option, but said Armour & Company, a corporation, would not purchase said stock at such a price or under the terms of the option agreement.

V.

Answering paragraph 6 of said complaint defendant denies each and every allegation, matter and thing contained in said paragraph, save and except defendant admits that plaintiff sold his stock to Armour & Company for two hundred ($200.00) dollars per

share, and further states the fact to be that plaintiff negotiated the sale of his stock to Armour & Company personally and without any representations being made to him by defendant.

VI.

Denies each and every allegation, matter and thing contained in paragraph seven of said complaint.

WHEREFORE, defendant prays that plaintiff take nothing by his action herein and that the defendant recover his costs and disbursements herein expended.

POST, RUSSELL & HIGGINS,
DON F. KIZER,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

E. H. Stanton, being first duly sworn, deposes and says: That he is the defendant above named; that he has read the foregoing amended answer, knows the contents thereof, and the same is true as he verily believes.

E. H. STANTON.

Subscribed and sworn to before me this 13th day of April, 1920.

W. H. MILLER,
Notary Public in and for the State of Washington,
Residing at Spokane. [13]

Filed in the U. S. District Court, Eastern District of Washington. April 13, 1920. W. H. Hare, Clerk. [14]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 3261.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff in the sum of Twenty-five Thousand One Hundred and Nine and 06.100 ($25,109.06) Dollars.

W. C. WEBSTER,
Foreman.

Filed in the U. S. District Court, Eastern District of Washington. April 15, 1920. W. H. Hare, Clerk. [15]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 3261.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Judgment.

This case came on regularly for hearing on this 12th day of April, 1920, before the Court sitting with a jury. Plaintiff appears in person and by his attorneys Messrs. Lee & Kimball and Frank H. Graves, Esq. Defendant appears in person and by his attorneys Don F. Kizer, Esq., and Frank T. Post, Esq. Both parties announced they were ready for trial. The jury was regularly impanelled and sworn to try the case. Testimony was introduced on behalf of both plaintiff and defendant, argument made by counsel and the case submitted to the jury under instructions of the Court. The jury retired and returned with the following verdict:

"We, the jury in the above-entitled cause, find for the plaintiff in the sum of Twenty-five Thousand One Hundred and Nine and 06/100 ($25,109.06) Dollars.

W. C. WEBSTER,
Foreman."

The verdict was ordered filed by the Court.

NOW, THEREFORE, from the foregoing and upon the verdict of the jury, it is hereby ORDERED, ADJUDGED AND DECREED, that plaintiff do have and recover from the defendant the sum of Twenty-five Thousand One Hundred and Nine and 06/100 ($25,109.06) Dollars, together with costs herein, to be taxed by the clerk, with interest thereon at the rate of six (6) per cent per annum from the date hereof, and that execution issue thereon.

FRANK H. RUDKIN,
District Judge.

Filed in the U. S. District Court, Eastern District of Washington. April 20, 1920. W. H. Hare, Clerk. [16]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 3261.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Order Extending Time for Filing Bill of Exceptions.

Upon motion of the defendant, and upon stipulation of counsel in open court, IT IS ORDERED that the time for service and filing by the defendant of a proposed bill of exceptions herein is hereby extended for the period of sixty (60) days from this date.

Done in open court this 20th day of April, 1920.

FRANK H. RUDKIN,

Judge.

Filed in the U. S. District Court, Eastern District of Washington. April 20, 1920. W. H. Hare, Clerk. [17]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Petition for Writ of Error.

Comes now E. H. Stanton, defendant herein, and says: That on or about the 20th day of April, 1920, this Court entered a judgment herein in favor of plaintiff, J. L. Hamilton, and against said defendant, E. H. Stanton, in the sum of Twenty-five Thousand One Hundred Nine and 6/100 ($25,109.06) Dollars, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of defendant, all of which will appear more in detail from the assignment of errors which is filed with this petition.

WHEREFORE, the said E. H. Stanton prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals in and for the Ninth Circuit of the United States, for the correction of the errors so complained of and that the Court fix the bond to operate also as a supersedeas and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

DANSON, WILLIAMS & DANSON,
Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. June 19, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [18]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Assignments of Error.

Comes now the defendant, E. H. Stanton, and makes the following assignments of error, which defendant avers occurred upon the trial of this cause and which defendant will rely upon in the prosecution of the writ of error in the above-entitled cause.

1. The Court erred in overruling defendant's objections and permitting the witness Huntley to testify as to the amount received by him in the sale of his stock to Armour & Co.

2. The Court erred in instructing the jury as follows:

> "I will state at the outset that the burden is upon the plaintiff to make out his case and to prove every essential fact material to a recovery by a fair preponderance of the testimony."

3. The Court erred in instructing the jury as follows:

"If you find in this case from a preponderance of the testimony that the defendant assumed and agreed to and did actually conduct the negotiations which resulted in the sale of the stock from the plaintiff to Armour & Co.; that the plaintiff had no knowledge concerning the price which Armour & Co. was willing to pay or the price which defendant was to get for his stock except such as the defendant gave him; that by reason of the misstatement of concealment of any material fact or facts by the defendant, plaintiff was induced to accept $200 a share for his stock whereupon $20 on the number of shares owned by him was added to the price paid to defendant for his stock without plaintiff's knowledge or consent, and that this $20 per share was added to the price paid defendant because Armour & Co. had been able to procure plaintiff's stock for $200 per share, then I charge you that the amount of money thus received, to wit: $20 a share, on the number of shares owned by plaintiff rightfully belongs to the plaintiff and that the defendant in equity and good conscience cannot retain it, and that your verdict should be for the plaintiff in that amount, together with interest [19] thereon from the time of its receipt by the defendant at the rate of 5% per annum."

4. The Court erred in instructing the jury as follows:

"On the other hand, I charge you that if the plaintiff conducted the negotiations for the sale

of his stock on his own responsibility without advising or consulting with the defendant and fixed his own selling price, there can be no recovery in this action even though the defendant may have received a greater price for his own stock, unless you find from a preponderance of the testimony that a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him. In the latter event, the plaintiff is still entitled to the right to recover regardless of the question of agency."

5. The Court erred in instructing the jury as follows:

"The theory of the plaintiff's case as stated in the complaint is this: That the plaintiff authorized defendant to sell his stock at the same price that defendant would sell his own stock, and that the defendant falsely and fraudulently represented to the plaintiff that the selling price was $200 per share and that in reliance thereon plaintiff agreed to sell his stock to Armour & Co. for the sum of $200 per share, whereas the sale was in fact made by the defendant, and that the defendant received from Armour & Co. upon the sale of plaintiff's stock the sum of $20 per share,"

6. The Court erred in instructing the jury as follows:

"In order for the plaintiff to recover *on this theory,* he must therefore establish by a preponderance of the evidence the following proposi-

tions: (1) that the plaintiff authorized defendant to sell his stock and the defendant agreed to sell the same at the same price that he received for his own; (2) that the defendant did in fact sell plaintiff's stock or induce plaintiff to sell the same; (3) that the price which Armour & Co. agreed to pay for plaintiff's stock was $220 per share and not $200 per share; (4) that Armour & Co. have actually paid or agreed to pay for plaintiff's stock the sum of $220 per share, paying or agreeing to pay $20 thereof to the defendant."

7. The Court erred in instructing the jury as follows:

"If the plaintiff has failed to establish by a preponderance of the evidence any of these propositions, the plaintiff cannot recover on that theory. If, however, you find from a preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was in fact paid or agreed to be paid to the defendant by Armour & Co., the plaintiff has a right of action for the sum thus paid or agreed to be paid to the defendant if still retained by him." [20]

8. The Court erred in instructing the jury as follows:

"If the jury finds from the evidence that the stock of the plaintiff was sold by the plaintiff on his own responsibility and not by the defendant, the plaintiff cannot recover in this action and your verdict must be for the defendant unless,

as already stated, you find from a preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was actually paid to or agreed to be paid to the defendant and was actually received and is still retained by him."

9. The Court erred in refusing to give defendant's requested Instruction No. 1, as follows:

"The theory of plaintiff's case as set out in the complaint is that the plaintiff authorized the defendant, E. H. Stanton, to sell his stock, and that E. H. Stanton agreed with the plaintiff to sell plaintiff's stock at the same price he sold his own stock and that the defendant falsely and fraudulently represented to plaintiff that the selling price was $200 per share, and that in reliance thereon the plaintiff agreed to sell his stock to Armour & Company for $200 per share, but that the sale was in fact made by the defendant, and that the defendant received from Armour & Company upon the sale of plaintiff's stock the sum of $20 per share for said stock.

In order for the plaintiff to recover he must establish by a preponderance of the evidence the following things:

(a) That the plaintiff authorized the defendant to sell plaintiff's stock and the defendant agreed to sell plaintiff's stock at the same price he sold his own stock.

(b) That defendant did in fact sell plaintiff's stock.

(c) That the price which Armour & Company promised to pay for plaintiff's stock was $220 per share, and not $200 per share.

(d) That Armour & Company have actually paid for plaintiff's stock the sum of $220 per share, paying $20 thereof to the defendant.

If the plaintiff has failed to establish by a preponderance of the evidence any of said matters, the plaintiff cannot recover herein."

10. The Court erred in refusing to give defendant's requested Instruction No. 4 as follows:

"If you should find from the evidence that before Armour & Company actually paid any money or delivered any notes to the plaintiff, the plaintiff learned in substance of the contract made between the defendant and Armour & Company, and did not attempt in any manner to recede from the contract which the plaintiff had signed with Armour & Company, which contract is in evidence, but went on and performed the same by depositing his stock in the bank, as provided in said contract and accepted the moneys and notes as paid by Armour & Company, then the plaintiff cannot recover in this action even though you find in favor of the plaintiff on the other issues as stated above." [21]

11. The Court erred in refusing to give defendant's requested Instruction No. 5 as follows:

"If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him with Armour & Company but that Armour & Company failed

to deposit the moneys and notes in the same bank as provided in said contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from said bank, notified Armour & Company that he repudiated said contract and would not live up to the same, claiming that he had been induced to enter into said contract through misrepresentation or fraud, and thereafter plaintiff entered into another contract with Armour & Company whereby he sold the stock in question together with other stock in the same company, and that said Armour & Company paid him therefor part in money and part in its promissory notes, then you must find for the defendant in this action, even though as to other issues stated above you should find that the evidence is in favor of the plaintiff."

12. The Court erred in instructing the jury as follows:

"If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him and Armour & Co., but that Armour & Co., failed to deposit the money and notes in the bank as provided in the contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from the bank and notified Armour & Co., that he repudiated his contract and would not live up to the same, claiming that he had been induced to enter into the contract through misrepresentation and fraud and there-

after plaintiff entered into a new and independent contract with Armour & Co. for a new consideration whereby he sold the stock in question, together with other stock in the same company and that Armour & Co. paid him therefor part in money and part in promissory notes, then you must find for the defendant in this action, even though as to the other issues stated above you should find that the evidence is in favor of the plaintiff. If, however, you find from a preponderance of the testimony that the stock was finally delivered to Armour & Co. pursuant to the contract made and entered into in the City of Spokane, and not pursuant to some new and independent contract, the attempt on the part of the plaintiff Hamilton to rescind his contract will not bar a recovery."

13. The Court erred in entering judgment on the verdict in favor of plaintiff.

14. The Court erred in denying defendant's motion for a new trial.

WHEREFORE, the said defendant, the plaintiff in error, [22] prays that the judgment of the said Court be reversed; that such directions be given, that full force and efficacy may inure to the defendant by reason of the assignments of error above and the defenses set out in his answer filed in said cause.

DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff in Error, Defendant in the Lower Court.

Filed in the U. S. District Court, Eastern District of Washington. June 19, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [23]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Order Allowing Writ of Error.

On this 19th day of June, 1920, came the defendant, E. H. Stanton, and filed herein and presented to the Court his petition praying for the allowance of a writ of error, and filed therewith his assignments of error intended to be urged by him, and praying that the bond to be given to operate also as a supersedeas and stay bond be fixed by the Court, and also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may be proper in the premises.

In consideration thereof the Court does allow the writ of error and the bond for such writ of error and also to operate as a supersedeas is fixed at the sum of Thirty Thousand ($30,000) Dollars, and upon defendant giving such bond all proceedings to enforce such judgment to be stayed until such writ of error is determined.

FRANK H. RUDKIN,
U. S. District Judge.

Filed in the U. S. District Court, Eastern District of Washington. June 19, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [24]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Writ of Error (Copy).

The President of the United States to the Honorable Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment on a plea which, in the said District Court before you, or some of you, between E. H. Stanton, plaintiff in error (defendant in the lower court), and J. L. Hamilton, defendant in error (plaintiff in the lower court), a manifest error hath happened to the great damage of said E. H. Stanton, plaintiff in error, as by his complaint appears:

We being willing that error, if any hath happened, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then

under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ, in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid, being inspected, this said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done. [25]

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of June, in the year of our Lord one thousand nine hundred and twenty.

W. H. HARE,

Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

Allowed by:

FRANK H. RUDKIN,
District Judge.

Filed in the U. S. District Court, Eastern District of Washington. June 19, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [26]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, E. H. Stanton, the defendant above named, as principal, and United States Fidelity & Guaranty Company, a surety corporation organized and existing under the laws of the State of Maryland, and authorized to become sole surety on judicial bonds, as surety, are held and firmly bound unto J. L. Hamilton, the plaintiff above named, in the sum of Thirty Thousand ($30,000) Dollars, to be paid the said J. L. Hamilton, his representatives and assigns, for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, our representatives, successors and assigns firmly by these presents.

Sealed with our seals and dated this 19th day of June, 1920.

WHEREAS, the above-named E. H. Stanton has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the Eastern District of Washington, Northern Division, and said

District Court has fixed the bond to be given on said writ of error at the sum of Thirty Thousand ($30,000) Dollars, to operate for the purpose of the writ of error and also as a supersedeas and stay.

NOW, THEREFORE, the condition of this obligation is [27] such that if the above-named principal, E. H. Stanton, shall prosecute said writ to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

E. H. STANTON. (Seal)

UNITED STATES FIDELITY & GUARANTY COMPANY,

By O. N. ANDERSON,

Its Attorney in Fact.

Approved June 19, 1920.

FRANK H. RUDKIN,

District Judge.

Filed in the U. S. District Court, Eastern District of Washington. June 19, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [28]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

E. H. STANTON,

Plaintiff in Error,

vs.

J. L. HAMILTON,

Defendant in Error.

Citation on Writ of Error (Copy).

The President of the United States to J. L. Hamilton, and to Messrs. Lee & Kimball and Graves, Kizer & Graves, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ pursuant to a writ of error regularly issued and which is on file in the office of the clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said court, wherein E. H. Stanton is plaintiff in error (defendant in the lower court) and J. L. Hamilton is defendant in error (plaintiff in the lower court), and to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable, EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 21 day of June, 1920.

FRANK H. RUDKIN,
United States District Judge.

Attest: W. H. HARE,
Clerk of said Court [29]

RETURN ON SERVICE OF WRIT.

United States of America,
Eastern District of Washington,—ss.

I hereby certify and return that I served the an-

nexed citation on the therein named A. B. Lee, by handing to and leaving a true and correct copy thereof with him, personally, at Spokane, in said District, on the 21st day of June, A. D. 1920.

J. E. McGOVERN,
U. S. Marshal,
By J. W. Dennison,
Deputy.

Serving writ—$2.00.
Mileage— .06.

$2.06.

Filed in the U. S. District Court, Eastern District of Washington. June 21, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [30]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That the above-entitled cause came on regularly for trial in the above-entitled court on the 12th day of April, 1920, at 10 o'clock A. M., before the Honorable Frank H. Rudkin, Judge presiding, and a jury impaneled. The plaintiff, J. L. Hamilton, appeared by his attorneys,

(Testimony of A. E. Kane.)

Lee & Kimball, W. E. Cullen and Graves, Kizer & Graves, and the defendant, E. H. Stanton, appeared by his attorneys, Don F. Kizer and Post, Russell & Higgins, whereupon the following proceedings were had and done, to wit: [31]

Testimony of A. E. Kane, for Plaintiff.

A. E. KANE, called and sworn as a witness on behalf of the plaintiff, testified that he was an official court reporter in the Superior Court of Spokane County and that he had reported a case of Fred B. Grinnell vs. E. H. Stanton; that in that case Mr. Stanton testified as follows:

"Mr. KIZER.—Just a moment, if I may; he didn't say 92,000—32,000 odd—

"Mr. GRAVES.—What do you mean by 92,000 odd? I want to get him somewhere where he will say. What were you to get over and above the $200 a share?

"A. I was to get twenty cents a share on all the stock that had been sold at that time.

"The COURT.—$20.00 you mean?

"A. Twenty dollars on all the stock that had been sold at that time, and it amounted to ninety-two thousand some odd dollars and that wasn't enough. Then I told them I would take the automobile in and even then it was not enough and then Mr. O'Hern made the proposition that he would give me $2.20 a share for all the stock I would turn over to him in four months; and I closed the deal on those lines.

"Q. You were to get $20 a share commission on all the stock that had been bought at that time?

"A. Yes, sir.

(Testimony of A. E. Kane.)

"Q. That included first Hample and Hamilton's stock? A. Yes, sir.

"Q. And second, it included yours and your family's stock?

"A. It wasn't a commission.

"Q. We won't call it anything. You were to get $20 a share on it?

"A. That was the way we figured it. [32]

"Q. That meant now, reduced to figures, that you were to get $20 a share on Hample's stock, didn't it?

"A. Not on Hample's stock, no, sir.

"Q. Didn't include that?

"A. No, sir; I had nothing to do with Hample's stock or Hamilton's.

"Q. What stock had been sold at that time that you were to get $20 a share on?

"A. On the stock that was sold—Mr. O'Hern—Mr. Robinson said it never would do to let that $100,000 or whatever it amounted to, get into Chicago that way. And that was the way he put it in. It was easier to let it go on the option that way.

"Q. Let me see if I understand that. The only stock that he bought at that time was your stock and Hample's and Hamilton's, was it? A. Yes, sir.

"Q. Hample had 1096 and a fraction and Hamilton had 1096 and a fraction? A. Yes, sir.

"Q. And you had 2,420 and a fraction?

"A. Yes, sir.

"Q. That is all they bought at that time?

"A. Yes, sir.

"Q. Didn't you just say you were to get $20 a share

(Testimony of A. E. Kane.)

on all the stock they bought at that time?

"A. I explained that transaction to you right *at* we were in that Davenport Hotel, start to finish. [33]

"Q. To me? A. Yes, right there.

"Q. Well, now, I am not asking you—I am a funny fellow about that; I like to get at it piecemeal. You were to get $20 a share on all stock that they had bought up to that time? A. Yes, sir.

"Q. Now they hadn't bought any stock up to that time had they, except you three men's?

"A. Yes; that is all.

"Q. Now, were you to get $20 a share on these three lots? A. It figured up that way.

"Q. Never mind how it figured up; I asked you were you to get that?

"A. Well, I was to get $20 a share on the stock that they had bought from Hample and Hamilton.

"Q. And that $20 was in addition to the $200 on what they had bought from you, was it?

"A. No, I don't think so.

"Q. Well, then, you were not—either you were or were not. I want to know which and I don't care a cent which it is.

"A. Yes, it was on the stock that they had bought. It all figured up that much; yes.

"Q. Then you were to get $20 on Hamilton's stock and Hample's stock, and Stanton's stock?

"A. Yes, sir.

"Q. In addition to the $200 on your stock?

"A. Yes, sir. [34]

"Q. And that figured up to just $576,400?

(Testimony of A. E. Kane.)

"A. Well, whatever it figures up.

"Q. Well, it does figure up to that, don't you know it? A. All right.

"Q. Don't you know it—you know I figured it all up with O'Hern, took me about two hours but I finally got him to it— isn't that a fact, that is what it figures to? A. The figures are right there.

"Q. It figures up to the price stated in the contract, doesn't it? $576,400, doesn't it?

"A. Something over $500,000.

"Q. Doesn't it figure up to the price stated in this contract between Armours and you, $576,400.

"A. Yes, sir; that is it.

"Q. So, then, instead of fixing a lesser sum of what you were to get for all of this goodwill, staying out of business, and guaranteeing accounts, and so on, instead of doing that you said, Now, you have got to give me $220 for my stock and then you have got to give me $20 a share on Hamilton's and Hample's stock?

"A. No, sir; nothing of that kind ever said.

"Q. All right, we will pass that. 'And in addition you have got to give me four months to speculate on the other fellows who haven't got in yet.'

"A. That was their proposition and not mine.

"Q. And you took it? A. Yes, sir. [35]

The plaintiff offered in evidence a contract between the defendant and Armour & Company, dated May 21, 1917, the same being admitted and marked Plaintiff's Exhibit 1.

The material portions of the said contract are as follows:

Plaintiff's Exhibit No. 1.

AGREEMENT.

THIS AGREEMENT, made and entered into this 21st day of May, 1917, by and between E. H. Stanton of Spokane, Washington, hereinafter called the first party, and Armour & Company, a corporation, hereinafter called the second party, witnesseth:

The first party agrees to sell to second party Two Thousand Four Hundred Twenty and two-thirds (2,420 2/3) shares of the capital stock of the E. H. Stanton Company, a corporation for the sum of Five Hundred Seventy-six Thousand Four Hundred ($576,400.00) Dollars, and said second party agrees to purchase of said first party said above mentioned stock at said purchase price; the purchase price to be paid as follows, to wit: Seventy-eight Thousand Four Hundred ($78,400.00) Dollars paid in cash to first party on or before June 1st, 1917, and notes aggregating Four Hundred Ninety-eight Thousand ($498,000.00) Dollars signed by second party and made payable to first party shall be delivered at the same time. Said notes shall each be dated May 25, 1917, and shall bear five per cent (5%) interest payable upon the dates following:

> There is here set out a list of notes payable at various dates between May 25, 1918, and May 25, 1921.

Second party further agrees to purchase from first party at Two Hundred Twenty ($220.00) Dollars per share, [36] payable in four annual installments, to be evidenced by promissory notes, any fur-

ther stock of the E. H. Stanton Company regardless of the purchase price said first party pays for such stock. This offer to remain open for a period of four months from date hereof.

In consideration of this agreement, first party agrees that no dividends will be declared by the E. H. Stanton Company until after the sale of his stock to second party has been consummated.

In consideration of the purchase price paid him by second party, first party agrees that for a period of ten years from date hereof, said first party will not engage in Montana, Oregon, Idaho or Washington either as owner, manager, employee or stockholder in a like or similar business to that now carried on by the E. H. Stanton Company, a corporation.

The first party guarantees the payment to second party of all accounts receivable of the E. H. Stanton Company as they appear of January, 1917, and those accrued, less the amount collected by second party on accounts which have been heretofore *been* charged off to profit and loss; that is to say if the losses on the accounts receivable exceed the amounts collected on accounts which have been previously *been* charged off to profit and loss, first party will pay the difference to second party.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year above written.

E. H. STANTON,
First Party.
ARMOUR & COMPANY,
By GEORGE B. ROBBINS, Vice-Pres.,
Second Party [37]

Testimony of Don Kizer, for Plaintiff.

DON KIZER, a witness called and sworn on behalf of the plaintiff, testified on direct examination as follows:

I left Spokane and went to Butte, arriving there on June 16. I left Butte on Saturday night, June 23, 1917. Mr. O'Hern arrived in Butte on June 21, 1917, two days before I left. I left before he did. Mr. O'Hern is general superintendent of Armour & Company.

Testimony of Fred B. Grinnell, for Plaintiff.

FRED B. GRINNELL a witness called and sworn on behalf of the plaintiff, testified on direct examination as follows:

I am a broker living in Spokane, Washington, and the president of the Fred. B. Grinnell Company.

(By agreement of counsel there was thereupon introduced in evidence and marked Plaintiff's Exhibit 2, an option contract, as follows:)

Plaintiff's Exhibit No. 2.

"Spokane, Wash., May 8, 1917.

Fred B. Grinnell, Esq.

Spokane, Washington.

Dear Sir:

Regarding situation of which we have been talking to-day beg to say the situation is about as follows: The capital stock is $600,000, Being 6000 shares par value $100.00 per share, plant $300,000.00 (cash $600,000.00) Stock on hand $800,000.00. Book

(Testimony of Fred B. Grinnell.)

Accts. $300,000.00. Total assets $1,400,000. Liabilities $285,000.00. I own or control 5084⅓ shares of the capital stock and hereby give you an option and agree to deliver same to you at any time on or before fifteen days from to-day upon the payment to me in cash of $220.00 per share. Also understood will give you whatever means that are necessary within this time for investigation of entire situation. I further agree to pay you (2) Two percent commission for selling stock of E. H. Stanton Company.

E. H. STANTON.

Witness:

ROBERT W. GRINNELL." [38]

This option was taken out at Mr. Stanton's office and my nephew, Robert Grinnell, wrote it. Mr. Stanton gave us the figures contained therein. It was signed by him on the day it bears date and was immediately telegraphed to Armour & Company at Chicago. Mr. Robbins, vice-president of Armour & Company, arrived here the Sunday following May 8, 1917, that is, May 13th, and the Monday following the general superintendent and auditor came. I took them out on Monday morning and introduced them to Mr. Stanton and left them there at the plant. Mr. Stanton said: "I want to make the best trade I can. I want to handle this thing and when I get through I will pay you as I agreed to."

Later that week they went over to Seattle. I was in consultation with Mr. Stanton almost every day concerning this deal. I knew when the deal was closed and Mr. Stanton told me he got less than $200

(Testimony of Fred B. Grinnell.)

a share for his stock and that the people who owned a part of the stock included in the option refused to pay commission on their share of the trade. I first found out in June, 1919, from information given me by Mr. Hample in Butte, Montana, anything different about the transaction. I was at Mr. Stanton's house on Sunday night, the night before the deal was closed, and talked with him concerning this deal in a room by himself.

Testimony of Robert Grinnell, for Plaintiff.

ROBERT GRINNELL, a witness called and sworn on behalf of the plaintiff, testified, on direct examination, as follows:

I drew the option agreement from Mr. Stanton which is Plaintiff's Exhibit 2 from information given us by Mr. Stanton. After the deal was closed Mr. Fred B. Grinnell and I talked with Mr. Stanton about our commission. He told us he only got $200 a share for his stock and that his associates wouldn't pay any part of the commission. [39]

Testimony of J. E. Hample, for Plaintiff.

J. E. HAMPLE, a witness called and sworn on behalf of the plaintiff, testified, on direct examination, as follows:

I reside at Butte, Montana, and have since 1896. I was one of the stockholders in the E. H. Stanton Company. I got my first stock in that company on the 1st day of January, 1906. At that time I got a third of one-half of the stock that was then issued.

(Testimony of J. E. Hample.)

Mr. Hamilton got the same amount at the same time. That is 250 shares and we paid $100.00 a share.

The next stock we got was in March, 1912. The company was in bad circumstances financially and Mr. Hamilton, myself and Mr. Stanton each agreed to take one-third of the stock that was then in the treasury and pay par for it. Mr. Hamilton and I paid for our one-third and Mr. Stanton gave a check for his. After we had gone he gave the company a note, and we did not know he had done so for something like a year afterwards. That note was never paid, and no interest was paid on it. That note was cancelled at the time of this transaction. Mr. Stanton, Mr. Fred Stanton and Mr. Hamilton and I were alone at Mr. Stanton's house on Sunday night, the 20th day of May, 1917. Mr. Stanton explained that Armour & Company were willing to cancel that note if they bought our stock, but they wanted the old directors to do so. Mr. Fred Stanton had a lead pencil and piece of paper, and he drew up something about it in writing and read it off, and said he would have it typewritten the next day, and if we sold out we could sign it. Fred Stanton claimed that Armour & Company's representatives told him how to word the paper which we drew up. I do not remember just how it read. After we sold out, Mr. Fred Stanton brought out the paper in Mr. Robbins' room on Monday afternoon, May 21, about five o'clock. I handed it over to Mr. Robbins and he said it was all right, understood by him, and we could sign it, and I did sign it at that time. [40]

(Testimony of J. E. Hample.)

On May 15, 1917, Mr. Stanton called me over the telephone from Spokane and said there were some parties here who wanted to buy the stock of the E. H. Stanton Company and said he was coming over to see Hamilton and myself about it. He came over the next day and got to Butte about 1 o'clock in the day time and left about 8 o'clock that evening. He told us he had a chance to sell out to Armour & Company and that they were looking over the plant and that he told them that he wouldn't sell his own stock unless they would take care of Hample and Hamilton. He said he didn't know what he could get for the stock, but that if he couldn't do better than $150 a share he thought he had better sell, and we told him $200 a share would be the least we would consider. He said he had to make a lot of improvements and that the Government had required him to put in concrete floors everywhere which would cost $150,000 or $200,000, and that he had a large amount of stock on hand and had a poor market for it.

He said if he didn't sell out they were going to start a plant themselves and that he would have to compete with them and that we would probably lose money if we were going to continue that way. I told him I was pretty busy, but that I would like to go over with him if I could arrange it. I went down to the depot to go with him, but the train had gone, so I sent him a telegram in care of the conductor to the effect that I would be in Spokane the next day. I don't remember what else was in the telegram.

(Testimony of J. E. Hample.)

Mr. Hamilton and I came over to Spokane together and reached here on May 18, 1917, between 9 and 10 o'clock in the morning. Mr. Fred Stanton met us at the train and we drove right out to the packing-house and met E. H. Stanton. Mr. Stanton took us over the place and showed us everything. He had made some improvements and we were very well pleased with them. He had a large amount of stock on hand and we were pretty well pleased and told him we guessed we would not sell out. [41]

We stayed at Mr. Stanton's house that night and until late on Saturday morning. He told us these people were going to make him a proposition and were looking the place over, but that he didn't know what it would be and that they only wanted to buy a certain amount of the stock and that he would not sell his stock unless we sold ours. And whatever he got for his stock we would get for ours, and he said that he would drive them just as hard as he could. He talked about the value of his stock and the circumstances to be met in the future, and said that if he could get $175 for his stock that he was ready to sell it. I told him "All right," that I would take it and pay him cash for it. At that he laughed and said that he might possibly do a little better. He told me his stock did not figure on the books over $184 a share and that there was a lot of things to be adjusted. I thought he was crazy for wanting to take $175 for the stock. I went in to see Mr. Roberts, his bookkeeper, and he told me the stock ought to be worth $250 a

(Testimony of J. E. Hample.)

share, book value of the stock and the increased market value of the goods.

I did not see Armour's men out at the plant. They couldn't have been out there very long. I saw some men leaving and was told they were Armour's men. I was up around the slaughter-house somewhere; I don't know where.

From the packing-house we went to his house with him and stayed all night. That night at his house Stanton said he would sell his stock and Mr. Hamilton's and mine together and wanted to do the trading, said he would make the hardest trade he could, and let us know what it was before he sold, and there was quite a lot of conversation regarding selling out. We talked till about two o'clock and so didn't get up very early. After breakfast Mr. Hamilton and I came up town and we didn't see Mr. Stanton until Sunday morning out at his house.

We went down to the Davenport Hotel to stay as we [42] didn't want to intrude on Mr. Stanton, and I accidentally became acquainted with Mr. Robbins there. I told him whatever trading he had to do he could do with Mr. Stanton. He said he didn't know what they would conclude to do, but that he had a man out in the country looking around, but that he hadn't made up his mind what to do. There was nothing said about price. He didn't say anything about a price or ask me about it at all. I did not see him again until up in his room Monday afternoon when I signed the contract. That conversation took fifteen or twenty minutes, perhaps, and I saw Mr. Robbins

(Testimony of J. E. Hample.)
at no other time, except in his room when the contract was signed while I was there.

Mr. Fred Stanton came to the hotel in the morning with his machine and said he had been looking for us in the evening before and could not find us and he wanted us to stay at the house, so we went for a drive out in the country with Fred Stanton and his present wife, now. Mr. Stanton came downtown with us and stopped at the bank, saying that he wanted to see Mr. Rutter about Armour & Company's notes; that Armour & Company didn't want to pay cash but wanted to give notes. I was satisfied with their notes, but it appeared that he wasn't. He was going to see Rutter about it.

Q. You thought Armour & Company's notes were good enough for you?

A. I didn't know what to do with the money after I got it.

When we got back to the hotel that evening we saw Mr. Stanton and he said he had been dickering with them all day, but had not been able to get them to come up. He said the best they would do, I think he said, was $190 a share. Mr. Hamilton spoke up and said he would not dicker on that, and he went and paid his bill and said he was going to leave that night for home. I had some other business to attend to so I told him I would stay a [43] day or two. Mr. Hamilton said he was going to pay his bill and go home that night. *After while* Mr. Stanton or Fred Stanton saw us again, and said they had gone up to $200.00 a

(Testimony of J. E. Hample.)

share and that some other things Stanton claimed talked all right now and if we would stay he thought he could make a trade. Mr. Stanton went and paid my bill and took me out home with him.

Monday morning we went out to the packing-house and stayed for dinner. In the afternoon we came downtown and Stanton, Fred, Hamilton and I went up to Mr. Robbins' room. Mr. Stanton told Mr. Robbins that he could make a contract with us at $200.00 a share. Mr. Stanton's lawyer, Mr. Kizer, was sent for, and he drew up a contract which we all signed.

This is the contract.

(Thereupon said contract was admitted in evidence and marked Plaintiff's Exhibit 3.)

Plaintiff's Exhibit No. 3.

AGREEMENT.

THIS AGREEMENT, Made and entered into this 21st day of May, 1917, by and between John E. Hample, of Butte, Montana, hereinafter called the first party, and Armour & Company, a corporation, hereinafter called the second party, witnesseth:

The first party agrees to sell to second party, Ten Hundred Ninety-six and one-third (1096⅓) shares of the capital stock of the E. H. Stanton Company, a corporation, at Two Hundred ($200.00) Dollars per share, and said second party agrees to purchase of said first party, said above-mentioned stock at said purchase price; the terms of sale being as follows, to wit:

(Testimony of J. E. Hample.)

First party shall deposit in the First National Bank, Butte, Montana, on or before May 25th, 1917, Ten Hundred Ninety-six and one-third (1096⅓) shares of the capital stock of the E. H. Stanton Company properly endorsed by said party [44] with instructions to said bank to deliver said stock to second party upon payment into said bank by said second party, to the credit of first party, the sum of Forty-three Thousand Two Hundred Sixty-six and 66/100 ($43,266.66) Dollars and four notes (4) signed by second party in favor of first party for Forty-four Thousand ($44,000.00) Dollars each, payable respectively 1918, two, three and four years after date, which date shall be May 25, 1917, bearing five per cent interest per annum, interest payable semi-annually. Second party shall pay said money and notes into said above mentioned bank on or before May 25, 1917, time being of the essence of this contract.

IN WITNESS WHEREOF, the parties hereto have set their hands the day and year first above written.

JOHN E. HAMPLE,
First Party.
ARMOUR & COMPANY,
By GEORGE B. ROBBINS,
Second Party.

The contract was performed according to its provisions. Before we left the room after signing the contract they said they wanted to keep the deal quiet and didn't want anybody to know that they had

(Testimony of J. E. Hample.)
bought an interest or any part of the Stanton outfit. [45]

Mr. Hamilton and I went to supper with Mr. Fred Stanton and then he took us to the train. When we went down into the lobby we met Mr. Grinnell and he asked us if we sold our stock and we told him we hadn't, because Armour's men told us that they didn't want it known that they were buying. Mr. Grinnell said, "If you left your stock with me, I can sell it for $220.00 a share." About that time Fred Stanton came in and the thing was dropped and we went to supper. I had previously had some correspondence with Mr. Grinnell about a piece of land and he had introduced himself on Saturday at the hotel and asked me if I was still interested in this land, and I told him no, I was not. That was my only acquaintance with him. I first heard about the option to Grinnell in June, 1919, when I met him in Butte. That was the first intimation I had about an option.

On Sunday night when we went out to Mr. Stanton's house Mr. Grinnell came to the door. Mr. Stanton said that Mr. Grinnell was out to see him about the trade, and wanted some commission. He said it would not amount to anything, and that if he had to pay any commission it would come out of him; he had planned to cover it from the notes and automobiles that he had received, that he was to have, meaning the $25,000 note. That is the only time commissions were ever referred to.

The only conversation I had with Mr. O'Hern was

(Testimony of J. E. Hample.)
in the room the afternoon we signed the contract. He was in the room.

Upon cross-examination by Mr. POST, the witness further testified as follows:

I have been in the business of buying and selling hide and wool in Montana ever since 1879. I have also been in the sheep and butchering business. I have also been operating in other lines of business. I stay at the hotel which Mr. Hamilton owns and my room is my office. He has another room in the same hotel which is [46] his office. Mr. Hamilton and I have both been on the Board of Directors of E. H. Stanton & Company since 1915, at least. We received an annual report of the company's business at the end of each year. This paper is the report for the year 1916, which I received in January, 1917.

(Thereupon said report was marked Defendant's Exhibit 4, for identification.)

This report shows a surplus of $472,784.00 and that the net value of the assets is $1,727,000.00. I had received the report when Mr. Stanton was in Butte, and we looked for it, but couldn't find it. I told Mr. Stanton that I had given the First National Bank a statement for credit purposes, that the stock was of the value of $200 a share. I wanted to come over with Mr. Stanton, to look things over. I had told Mr. Stanton that I was busy at the time, and didn't think I could get away.

I sent him a telegram saying that I would be over the next day. I don't remember what else was in the telegram.

(Testimony of J. E. Hample.)

At the time I bought my stock, after I put my money into it, it might have been worth $150,000; yes, sir; that was January 1, 1906. Mr. Hample, Mr. Hamilton and Mr. Robertson who was the bookkeeper at the plant, kept in close touch with the business until about 1911. After 1911 we did not keep in touch with it In 1911 we reorganized and increased the capital stock to $600,000.00. Mr. Overholt managed it for a year or a year and a half. Stanton was not here part of the time, but he was in St. Louis sick one winter. After Mr. Overholt died, Mr. Stanton took charge of it exclusively from 1912 to 1917. Mr. Hamilton and I came over occasionally, once or twice a year. Under Mr. Stanton's management, the property grew to be worth over a million dollars. Mr. Stanton's salary during that time was $300 a month.

One of the Stantons said to us Sunday night that he [47] thought if we didn't go away a trade could be made. He said them fellows were talking all right that night, and that if we would stay until the next day we would be able to do business.

Upon redirect examination Mr. HAMPLE further testified: I received this letter from Mr. Stanton.

(Thereupon the said letter was admitted in evidence without objection and marked Plaintiff's Exhibit 5.)

Plaintiff's Exhibit No. 5.

Spokane, Wash., June 14, 1917.

Messrs. Hample & Hamilton,

Butte, Montana.

Gentlemen:

I have heard several times through different sources that you gentlemen are some what dissatisfied with your deal, Made in selling your stock you had in the E. H. S. Co. I would advise you not to talk to much until you know what you are talking about, you should congratulate *ourselves* on our sale. You are very licky and dont know it. I shall probly see you before long.

I remain resp. yours,

E. H. STANTON.

Testimony of J. L. Hamilton, for Plaintiff.

J. L. HAMILTON, called and sworn as a witness on behalf of the plaintiff, testified as follows:

I am 67 years of age and have lived in Butte, Montana, since 1875. I own real estate and a ranch and have a hotel there. At the time of the sale of the Stanton Company stock, I owned 1096⅓ shares. Mr. Hample and I took out the same amount of stock in 1906 and again in 1912. The company needed money in [48] 1912 and Mr. Stanton and we two took out equal amounts of stock, and Mr. Stanton owed the company $25,000 on his. Mr. Stanton agreed to put up the money the same as we did and we supposed he had until we got the next statement and saw that the company had let Mr. Stanton have the $25,000

(Testimony of J. L. Hamilton.)

more; that was the $25,000 note that was released at the time of this deal.

On Saturday, May 19, when we were in Spokane, Mr. O'Hern said that Stanton wanted this note released and that the old Board of Directors would have to do it. He also said that Mr. Stanton wanted the automobile. This was about 10 o'clock in the morning at the Davenport Hotel.

When Mr. Hample and I and Mr. Stanton and Fred Stanton were out at Mr. Stanton's residence this question was brought up and it is my recollection that Fred Stanton drew up a resolution with a pencil and paper. I am not sure that we signed it that day. It was passed and signed either Sunday night or Monday. I think the automobile was in the same resolution, but I am not sure. I think we said that the reason for releasing this was that Mr. Stanton might have some commission to pay and Mr. O'Hern told me that we could put that in as commission, compensation or anything we might think reasonable. He said we would have to assign some excuse.

The first thing I heard about selling the stock was on the 16th day of May, 1917, when Mr. Stanton was over at Butte. He said he had a good chance to sell and that we might not have another chance. He said he had to do a lot of work on the plant and that the competition was strong and that the Armour & Company or somebody might start on their own hook. We talked about the price. I got in about 2 o'clock in the afternoon and Hample and Stanton had talked before that. I was with them the rest of the after-

(Testimony of J. L. Hamilton.)

noon talking it over. He left that evening and I left Butte the next day and came over to Spokane with Mr. Hample. He did not mention [49] anything about an option at that time nor at any other time. No one else ever said anything to me about an option having been given. The price talked about at Butte was $150.

Fred Stanton met us and took us out to the plant where we met Mr. Stanton and looked things over and we thought things looked very nice. There was a machine drove up and two men got out and Mr. Stanton said, "That is the Armours. Now," he says, "Don't say anything to them about the deal, but let me do the trading and I will do the very best trade I can, and whatever you get I will get." He says, "I don't want to make a cent off of you and Hample." We went out with Mr. Stanton to meet them and were introduced to them. They were Mr. O'Hern and Mr. Robbins of the Armour Company. We talked with them a while and then they went away and went back to town.

We stayed out to the plant until closing time and then went home with Mr. Stanton. Went to his house and stayed there that evening and night. We talked over the deal with Mr. Stanton and about what we could get. I think Mr. Stanton said he probably could get about $175.00 a share. He said, "I might be able to work them up for a bigger price, but," he says, "I will press them just as hard as I can and whatever I get you and Hample will get." A bigger price than $150 a share, I said, "I won't take no $150

(Testimony of J. L. Hamilton.)

a share." I think he said he could probably get $175, and I think Hample said, "I would give more than that," or "I would give that," but Stanton says, "Whatever I get you and Mr. Hample will get the same amount. I don't want to make one penny off of you boys. I will press them as hard as I can."

The next morning was Saturday morning and after breakfast we came down town about 11 o'clock and went to the Davenport Hotel. Mr Stanton had gone out to the plant early. We met Mr. O'Hern at the Davenport Hotel when we first went down there. He [50] told me that Mr. Stanton was very unreasonable; that he wanted too much. "He wants a whole lot of things that is unreasonable. He wants his note cancelled, and he wants an automobile." He says, "If you people do come to a deal you can do that, but the old board would have to do it," and I says, "I figure that would amount to about $30,000." The $25,000 note and the one or two automobiles would probably amount, I figured, to about $5.00 a share on his stock. I do not know that I told O'Hern that. That is about all the conversation I had with him. I had no other talk with Mr. O'Hern except to talk with Mr. Robbins and Mr. O'Hern at the plant when we were introduced. I had no talk with Mr. Robbins. I did not mention to either one of them, nor did either one of them mention to me anything about the price of the stock. I was leaving Mr. Stanton to negotiate the sale of my stock and I took no part in it with them whatever. I talked with Mr. Robbins and Mr.

(Testimony of J. L. Hamilton.)

O'Hern at the plant and to Mr. O'Hern at the hotel and these were the only talks I had with them.

Sunday morning we went out to Mr. Stanton's house and had dinner and after dinner Fred and the young lady and Mr. Hample and myself with Mr. Stanton came downtown. Mr. Stanton got out at the bank. The rest of us rode around town until nearly night. Mr. Stanton told us that night they only wanted to buy 51% of the stock and he says, "I will do the best I can and whatever I can do you will get too. I won't sell my stock without they take all of yours and Mr. Hample's."

We met Mr. Stanton at the hotel Sunday night. He said the Armours won't raise their price to $190. "Well," I says, "I won't take that." Mr. Hample and I went up to the room at the hotel and talked it over. I told him that I was going home to Butte. I would not take $190. So I left him. He was going to stay. He has some other business. I went down to the hotel and paid my bill and got my grip and started out. About the time I [51] got to the door either Fred or Mr. Stanton came and says, "The Armours have agreed to give $200." I says, "All right, I will stay over," and we got in their machine and went out to Mr. Stanton's house. We stayed out at Mr. Stanton's house again Sunday night and while we were there someone came to the door and Mr. Stanton talked to him in another room. I understood that it was Mr. Grinnell. Perhaps Mr. Stanton said it was. Anyway, Mr. Stanton said this man thought he ought to have some commission and that

(Testimony of J. L. Hamilton.)

he was taking care of that, that it wouldn't cost us anything. He did not mention commission at any other time.

We went downtown Monday morning after breakfast. Mr. Stanton said the Armour people would meet us downtown that morning and fix it up. We went down to the hotel and waited a while and then called up Mr. Stanton and went out to the plant. After we had been there a while Mr. Stanton brought us in town and we went up into a room in the hotel and Mr. Stanton told Mr. Robbins and Mr. O'Hern that we would take $200 for our stock. Someone called up Mr. Kizer and Mr. Kizer came over and drew up the contract.

(It was thereupon stipulated that the contract between Mr. Hamilton and Armour & Company was the same as Plaintiff's Exhibit 3 except the escrow was to be held by the Bank of W. A. Clark & Brother instead of the First National Bank, and that the clause "time being the essence of this contract" is not in it.)

We signed the contract and went to Butte that night.

After signing the contract somebody talked to Mr. Hample there in the hotel that evening. Mr. Hample told me that it was Mr. Grinnell and that Grinnell told him he could get $220 a share for the stock.

After returning to Butte I deposited my stock in the W. A. Clark Bank. I left it there until the 31st day of May. At that time Armour & Company had not deposited their money and I took the stock out

and on the 4th day of June I sent a telegram to Armour & Company, of which this a copy. [52]

(The said telegram was thereupon admitted in evidence and marked Plaintiff's Exhibit 6 and reads as follows:)

Plaintiff's Exhibit No. 6.

Butte, June 4, 1917.

George B. Robbins,
Chicago, Illinois.

Your failure by ten days to comply with contract releases me, see letter copy sent.

J. L. HAMILTON.

The next day I received an answer to the telegram, which is Plaintiff's Exhibit 7, admitted in evidence. Said exhibit reads as follows:

Plaintiff's Exhibit No. 7.

119 chj 234 pm. 58.
AR US Uds Ills Jun 5 1917
Jas L Hamilton
Butte Mont

Your wire fourth letter not received contract provides for payment on or about May twenty-fifth therefore tender payment made in accordance with terms of contract particularly in view of fact that two sundays and a holiday intervened we acted in perfect good faith and I again urge you in all fairness to complete the trade as agreed.

G. B. ROBBINS.

After I sent my first telegram I received a telegram from Armour & Company.

(Said telegram was thereupon admitted in evidence and marked Plaintiff's Exhibit 8.) [53]

Plaintiff's Exhibit No. 8.

B72un da 39

Us Yards Ills 503P June 4 1917

James L. Hamilton

Butte Mont.

Upon my arrival home find through error your drafts and notes sent First National instead Clark Bank but since turned over to latter We apologize for trouble and request you immediately accept and deliver stock as per agreement advise.

GEO. B. ROBBINS.

437 PM.

The letter which he sent to Armour & Company of date June 4, 1917, is Plaintiff's Exhibit 9, admitted in evidence and marked Plaintiff's Exhibit 9.

Plaintiff's Exhibit No. 9.

Butte, Montana, June 4, 1917.

Armour & Co.,

Chicago, Ill.

Gentlemen:

On May 22d, 1917, I deposited with the Bank of W. A. Clark & Brother of this city, *then* hundred ninety-six and one-third (1096 1/3) shares E. H. Stanton Company Stock, as per contract with your Mr. Robbins at Spokane, Washington. Up until the close of the bank to-day, June 2d, Clark's Bank had not received or heard anything from your company. I, having complied with my part of the contract, to the letter, and your Company having utterly failed,

(Testimony of J. L. Hamilton.)

I took the stock out of the bank eight days later than the appointed time. I want to sell my stock, but want the same price that Mr. Stanton gets for his. I don't want Mr. Stanton to make twenty-five dollars per share on my stock. He told Mr. Hample and [54] myself that Two Hundred Dollars ($200.00) per share was the limit you would give and we were getting exactly the same as he was. I now find out, through Mr. Fred B. Grinnell of Spokane, that he had an option from Mr. Stanton on my stock, two hundred twenty (220.00) per share, that is, an option on five thousand and eighty (5080) shares at that price, and your Company was willing to take the said stock at said price. Mr. Stanton obtained permission to sell my stock by false representations and fraud of the worst kind. I am willing to let your Company get this stock if you want it at the price you pay for Mr. Stanton's stock.

Very truly yours,

J. L. HAMILTON.

Before taking my stock out of Clark Brothers' Bank I had legal advice from somebody in the bank. He wasn't a practicing lawyer and didn't charge for it. After getting that advice I took my stock out. In the letter of June 4th, Exhibit 9, I said I had found out through Fred B. Grinnell & Company that an option had been given. I had not talked with Fred B. Grinnell upon that subject. I cannot tell at this date who did give it to me unless I got it from Mr. Bender, who was over here the next day. He was one of the cattle buyers for the Stanton Company. He was in Butte on the 23d. He told me that it was

(Testimony of J. L. Hamilton.)

all over town that we had sold out, and I talked with him about an hour, but just what he did tell me, or whether he told me anything about that, I cannot say. I cannot now remember who gave me that information, but I know I got it from some source, and I did not get it until after I had left Spokane on the 21st of May. The first time I ever talked to Fred B. Grinnell in my life was in October, I think it was, in 1919, in Butte.

After this telegram and letter were sent Mr. Kizer came over to Butte as attorney for Armour & Company. That was on the 6th day of June. Mr. Kizer told me I would have to come through [55] according to the contract. I told him my attorneys advised me not to give it up and he threatened to start suit. I told him I would not agree to dispose of the stock, and we signed an agreement that I would not dispose of it until I had more definite information. He says, "If you will go to Mr. Currett or Sanders I will bet you $20 or $50 that they will advise you that you have got to give that up." He says, "All you can collect is perhaps some interest for the money during the time it wasn't there." I later employed Mr. Sanders and he gave me an opinion on the question. The opinion is Plaintiff's Exhibit 10, and the material portion is as follows:

Plaintiff's Exhibit No. 10.

"With reference to the controversy between you and Armour & Company over the contract, which was entered into on the 21st day of May, 1917, involving the sale by you of 1096 1/3 shares of the capital stock

of the E. H. Stanton Company, it appears that the original contract provided that Armour & Company should pay $43,266.66 and four notes of $44,000.00 each, bearing interest, into the banking-house of W. A. Clark & Bro. 'on or before May 25, 1917,' and said original contract contained the clause 'Time is of the essence,' etc., but the date of payment of the money and deposit of the notes being somewhat short, the contract was altered to read that Armour & Company should pay said money and notes into said bank on or *about* May 25, 1917, and the clause with reference to time being the essence thereof was stricken out. Thereafter, Armour & Company apparently not closely examining the contract deposited the money and notes with the First National Bank, where they remained until the fourth day of June, when Mr. Davis advised Mr. Johnston, of Clark's Bank that the money and notes were in his possession, requesting that Clark's Bank take them over, which Mr. Johnston declined to do, and thereupon advised you of his action which you coincided with, [56] declining to accept the first cash payment, or the notes, Armour & Company is now threatening to institute an action to compel you to comply with the contract and you desire to be informed as to the reasonable prospects of successfully defending the suit."

This opinion simply advises that the only legal damages sustained by Mr. Hamilton was interest on the amount that was to be paid from the day it was paid until it was actually tendered to him.

Some time after he was there I employed Mr. San-

(Testimony of J. L. Hamilton.)
ders and he gave me an opinion on the question.

On June 6, 1917, Mr. Hamilton wrote a letter to Don F. Kizer at Spokane, Washington, which said letter is Plaintiff's Exhibit 11, and is as follows:

Plaintiff's Exhibit No. 11.

June 6, 1917.

Don F. Kizer,
City.
Dear Sir:

In regard to our conversation of to-day in regard to the controversy over the contract heretofore entered into by me with Armour & Co., for the purchase by them of my holdings in the E. H. Stanton Co., of Spokane, Washington, I agree to give you a definite answer before June 16, 1917, and will not transfer said stock in the meanwhile to anyone except Armour & Co., and will not transfer it for at least four or five days thereafter, so that you may have an opportunity to commence suit against me for the enforcement of the contract, if your client desires.

J. L. HAMILTON. [57]

I got the Sanders opinion on either June 19th or 20th. It is dated the 18th and I paid for it on the 22d, as it appears from my check.

On June 14, 1917, Mr. Hamilton wrote a letter to Don F. Kizer, of Spokane, Washington, which is admitted in evidence and marked Plaintiff's Exhibit 12, and is as follows:

Plaintiff's Exhibit No. 12.

Butte, Mont., June 14, 1917.

Don F. Kizer,

Spokane, Washington.

Dear Sir:

My attorney advises me not to deliver the stock to Armour & Co., as they failed to live up to their part of the contract and for other reasons. He thinks the Court will say that ten days was not a reasonable time in which to comply with the delivery, as that was neglect in letting the notes and draft lay in another bank in the City of eight days.

Some of the points I told my attorney were: The cashier of Clark's Bank had my phone number to call me when the notes and draft reached the bank; I was in the City every day except one from May 25th until June 4th and no messenger called on me to inform me that the notes and draft were in the First National Bank, until June 1st. On June 4th the notes and draft were taken to Clark's Bank. I also told him I thought there was a conspiracy between Armour & Co. and Mr. Stanton to buy my stock for considerable less money than Mr. Stanton was to get for his; that Mr. O'Hern assured me that Mr. Stanton would not get more than Five ($5.00) Dollars per share more, as he, Mr. Stanton was to pay a commission. I waived the point; that Mr. O'Herron said, they (Mr. O'Herron and Mr. Robbins) had packed their trunks and would leave that night, and if we did not sign up, the deal [58] was off. Also that the erasing of the clause in the contract was sim-

(Testimony of J. L. Hamilton.)

ply to give Armour & Co. sufficient time to get their papers here.

Armour & Co. need not be in a rush to bring suit, for I will give them a contract that I will not dispose of my stock to anyone else for three months and will inform them thirty days before I dispose of it, and they can buy it from me as cheap as they did from Mr. Stanton. I want them to get the stock if they want it and will not sell it to any of their competitors. If I don't sell to them, I will be their partner.

I was informed that Mr. Good wanted an option on the Overholt stock at Two Hundred ($200.00) Dollars. He is with Wilson & Co. I suppose Armour & Co. will not want to buy that stock for a year as Mr. Stanton has that time to deliver it to them. If that is not the case, you know where the stock is.

Yours very truly,

J. L. HAMILTON.

When Mr. Kizer came to Butte the second time I signed an agreement with him which is Plaintiff's Exhibit 13.

The contract was made the 18th day of June between Armour & Company of one part and Hamilton of the other; recited that Armour & Company were about to institute an action against Hamilton for the specific performance of a written contract between the same parties, dated May 21st, 1917, for the sale by the second party to the first party of 1096 1/3 shares of the capital stock of the Stanton Company and that it is the desire of the parties to obviate the necessity of an injunction restraining the second

(Testimony of J. L. Hamilton.)

party from transferring the stock during the pendency of the action, and it is therefore agreed that the second party shall deposit said stock in the bank of W. A. Clark and Brother to be [59] held there pending the final determination of the suit and that neither said deposit nor the execution of this instrument shall be construed as a waiver of any defenses.

On the 22d day of June, 1917, we signed another agreement providing that I was to deposit the stock in the Clark Brothers Bank, to be held there for six months and if the suit was not terminated by that time to remain there for four months in addition. Armour & Co. were to deposit a draft for the purchase price of the stock and four notes, to be held during the pendency of the action.

This agreement is Plaintiff's Exhibit 14. Afterwards, on the 22d or 23d day of June, my stock was delivered to Armour & Co. and they gave me a check and the notes for it.

My bank-book shows that the check for this 1096⅓ shares was deposited on the 25th of June and the notes were delivered to me at the same time. The 25th of June was a Monday. I have one note that has not been paid off. I left the others home in the First National Bank of Butte. They are put there for security. This is one of the original notes, which reads as follows:

$44,000. Chicago, May 25th, 1917.

On May 25th, 1920, after date Armour & Company promises to pay to the order of James L. Hamilton, $44,000 at the Continental & Commercial Bank in Chicago, Illinois, value received, with interest at the

(Testimony of J. L. Hamilton.)

rate of five per cent per annum, payable semi-annually.

(Signed) ARMOUR & COMPANY.
By FREDERICK W. DROWLE and
CARL HAZARD,
Assistant Treasurer.

Due May 25th, 1920.

They paid me $278.38 as interest. I delivered up this stock and took these notes and this check, because Mr. Sanders told me I had no chance to beat a suit and Mr. Kizer threatened to bring suit pretty near every day. [60]

The COURT.—Those notes and consideration for the second transfer was the same as the first?

Mr. GRAVES.—I will ask him about that.

Q. All of these notes are like this one that was introduced in evidence under date of May 25th?

A. Yes, sir.

Q. The same amount as called for by the original contract? A. Yes, sir.

Q. Do you know whether these notes and this check are the same ones that they had by mistake deposited in the First National Bank instead of in the bank of W. A. Clark & Company?

A. Yes, sir; the notes was—they tendered the money, but not the check, cash, but the note is exactly the same as the one that they tendered to me some time previously.

Upon cross-examination by Mr. POST, the witness further testified as follows:

I own three of four pieces of real estate in Butte,

(Testimony of J. L. Hamilton.)

I also own a grocery-store, a hotel and a ranch.

I saw the statement which Mr. Hample got from Armour & Co. in 1917.

Mr. Stanton seemed to be downhearted and depressed and said that they would have to spend a lot of money repairing the slaughter-house, and competition was very strong and that if he didn't sell now that they might never get another chance.

I testified in the Grinnell case that I sent Mr. Stanton a telegram and told him not to sell as I was coming over. That I would take the train the next night for Spokane.

We talked at various times with Mr. Stanton about the price at which this stock should be sold. I know that when we [61] were talking about $190 a share I told him I wouldn't take less than $200, and we fixed the price of our stock at $200.

The statements were sent to Mr. Hample, but I am in his office most of the time. His office is in my building.

The first time I saw Mr. O'Hern was on Friday and the next time I talked to him was on Saturday. I asked Mr. O'Hern how Stanton and he were progressing with the trade and he said Stanton was unreasonable and wanted a lot of things; he wants that note cancelled and two automobiles and is very unreasonable. He says, "If you people come to an agreement you can cancel that note." I thought it was strange that they were willing to give him about $30,000.00. And I figured out that that would be about $5.00 a share more than the $200 a share. I

(Testimony of J. L. Hamilton.)

just figured it up in my head. I don't know how much it would be. I know it would be more than that. And then he spoke about we could assign a reason as a matter of commission to be paid. I might have told Mr. O'Hern that I wouldn't take less than $200; I know I told Mr. Stanton I wouldn't, and I may have told O'Hern I wouldn't. O'Hern did not say to me what Stanton was asking for the stock. He just said he was unreasonable and nothing was said between O'Hern and me as to the price of the stock, no talk about $200 a share. He did not tell we what Stanton was demanding for his stock. He never said a word about guaranteeing the bills receivable, or anything of that sort. Stanton said nothing to me about it at all. He never said a word to me about guaranteeing that Stanton would never go back into the meat business.

I know this resolution in regard to the note was drawn up at Stanton's house Sunday night, and I may have signed it there. I was in Spokane on the 8th day of June; four days after I wrote this letter to Armours. I didn't see Mr. Stanton or Mr. Kizer while I was there, and I didn't try to locate them. [62]

On June 25th, I made a deposit in the bank of $49,192.27, that includes the forty-three thousand and odd dollars on account of this stock, and at the same time they also gave me either a check or a draft on account of the Overholt stock. That check was sent to Kidder & Peabody Company in Boston. They are stock brokers and I had been investing in stocks through them. My statement through them shows an

(Testimony of J. L. Hamilton.)

item of Armour & Company, $34,133.33. I got that check about the same time as I got the check for $43,000. It might have been a day or two after or before, or it might have been at the same time, I can't remember. When I referred to the Overholt stock in my letter to Mr. Kizer I must have known about the contract Mr. Stanton had with the Armour & Company. Somebody had told me about it, but I don't know who it was or when.

I got some other notes from Armour & Company which I have in my possession for them here in addition to the notes for the 1096⅓ shares. One of these notes read in evidence is as follows:

"$34,000. Chicago, June 21, 1917.

On June 21st, 1920, after date Armour & Company promises to pay to the order of James L. Hamilton $34,000 at the Continental & Commercial National Bank of Chicago, value received, with interest at five per cent per annum, payable semi-annually.

(Signed) ARMOUR & COMPANY.
By FREDERICK W. COWELL,
Treasurer.
By CHARLES E. HAZARD,
Assistant Treasurer."

I never asked Kizer any price for the Overholt stock. I did not refuse to sell the 1096⅓ shares unless he bought the Overholt stock also for Armour. I did not contend that I would not sell one bunch unless I sold the other. I didn't care whether I sold the 773 Overholt stock or not, but I knew I had to give up the other stock. Armour paid me by draft about $34,000

(Testimony of J. L. Hamilton.)

on account of the Overholt stock. That was deposited with Kidder & Peabody Company in Boston. I have their statement. (It is [63] produced.) It shows Armour & Company's draft for $34,133.33 on June 2d. I mailed it to them. It may have been some days after I got it. I do not know how long. I do not say positively I did not get the draft for $34,133.-33 the same date as the $43,000 *vhrvk.* I got it about that time. It might have been a day or two before, or it might have been after. I do not remember whether I turned over both bunches of stock at the same time or not.

On redirect examination the witness further testified:

This check of Armour & Company's was number 06077, dated June 19 for $34,133.33 on the National City Bank, New York City. I mailed it to Kidder & Peabody on June 26th. The original notes were turned over to me, according to my memorandum, on June 23. I listed the notes. These are the notes for the 1096⅓ shares.

Q. Did you also make a memorandum as to the date these original notes were turned over to you?

A. Yes, sir.

Q. What date was that? A. June 23d.

Q. You listed the notes, did you? A. Yes, sir.

Mr. POST.—That is the note you have referred to in relation to the 1096 shares? A. Yes, sir.

Q. Have you got a memorandum as to when the notes were turned over to you? A. No, sir.

(Testimony of J. L. Hamilton.)

Q. You haven't any memorandum of that?

A. No, I haven't. I didn't keep any. [64]

Q. Is that the only book you kept? A. Yes, sir.

Testimony of William Huntley, for Plaintiff.

WILLIAM HUNTLEY, called and sworn as a witness on behalf of the plaintiff, testified as follows:

I owned 100 shares of stock in the E. H. Stanton Co. About two months after they bought Mr. Stanton's stock I sold mine for $220.

Mr. Post, attorney for the defendant, objected upon the ground that it was not material and does not make any difference what other people received for their stock.

The COURT.—The only question in my mind is whether it is not anticipating a defense. As I say, I think it will ultimately become material at some stage of the trial. He may answer the question.

Testimony of H. A. Roberts, for Plaintiff.

H. A. ROBERTS, called and sworn as a witness on behalf of the plaintiff, testified as follows:

I was bookkeeper and secretary-treasurer for the E. H. Stanton Co. The general ledger shows that a note for $25,000 was given by E. H. Stanton to the E. H. Stanton Co. on May 18, 1912, and that that note was cancelled by an entry made under date of May 21, 1917, and charged to Administration Expense.

Upon cross-examination by Mr. POST, the witness further testified:

At the time I made that entry I had the resolution that had been passed by the Board of Directors.

(Testimony of F. M. Rothrock.)

They were in the minute-book of the company at that time. [65]

(Thereupon a certified copy of said minutes were introduced in evidence and marked Plaintiff's Exhibit 15.)

Plaintiff's Exhibit No. 15.

"As an additional compensation for services rendered to E. H. Stanton Co. since 1905, the Secretary-Treasurer is hereby authorized to cancel and return to E. H. Stanton his promissory note dated March 19, 1912, due on demand in amount of $25,000.00, made payable to E. H. Stanton Co. An entry crediting Bills Receivable and charging Administrative Expense is hereby authorized.

Testimony of F. M. Rothrock, for Plaintiff.

F. M. ROTHROCK, called and sworn as a witness on behalf of the plaintiff, testified as follows, upon direct examination:

At the time of the sale of the E. H. Stanton Co. stock to Armour & Company I owned 100 shares of the stock of E. H. Stanton Company. About the 1st of the following September I sold it to Armour & Company.

Q. What price did you receive from Armour & Company?

Mr. POST.—I object as immaterial at this time.

The COURT.—He may answer.

A. $250.00 per share.

Testimony of E. H. Stanton, for Plaintiff.

E. H. STANTON, called and sworn as a witness on behalf of the plaintiff, testified as follows:

I am the defendant. I sold the stock of T. J. Armstrong to Armour & Company.

Thereupon the plaintiff rested and the defendant introduced evidence as follows: [66]

DEFENDANT'S EVIDENCE.

Deposition of John E. O'Hern, for Defendant.

The deposition of JOHN E. O'HERN was read in evidence by the defendant and is as follows, upon direct examination:

I am the general superintendent of all of Armour & Company's plants and was such in 1917. In May, 1917, I was at Excelsior Springs and was instructed to go out to Spokane and look over the Stanton & Company plant with Mr. Robbins, vice-president of Armour & Company. Mr. White told me that I would meet Mr. Robbins there and would report to Mr. Robbins as to my estimate on the value. I understood there was an option on the plant.

On meeting Mr. Robbins we met Mr. Irvine, who in turn introduced us to Mr. Grinnell, and the four of us went out to see Mr. Stanton. I looked over the plant for a period of two or three days, during which time we had various conferences with Mr. Stanton asking for information. At the conclusion of that time Mr. Robbins told Mr. Stanton that we were not in a position to pay cash for the plant and also told him there was some book accounts we would have to

(Deposition of John E. O'Hern.)

know more about and would have to have a guarantee as to the reliability of these accounts, and suggested that we make an inventory and take the stock at inventory value. Mr. Stanton objected to that and said he did not want to sell that way, and the conferences finally wound up by Mr. Robbins stating that under the circumstances he was not prepared to buy.

A further conference that I had with Mr. Stanton indicated that Mr. Stanton was willing to sell and I believe that Mr. Robbins had some more conferences with him in regard to prices. [67]

Mr. Stanton went over to Butte or some place to see Mr. Hamilton and Mr. Hample. He came back in the morning, but we did not see him until afternoon, and he advised us that while he had heard these men were willing to sell, he heard later that they did not want to sell, but would be in personally. I saw Mr. Hample and Mr. Hamilton a day or two later. I cannot say what date this was closer than the second week in May.

Mr. Hample and Mr. Hamilton came to me one evening in the hotel and said they understood I was there to purchase the stock. I told them Mr. Robbins was negotiating and I was just inspecting the plant. There seemed to be some feeling between them and Mr. Stanton. They were together, but Mr. Hamilton did most of the talking. They said they did not give anybody any authority to sell their stock, and if the stock was sold they were going to sell it themselves.

Mr. GRAVES.—I would suggest we know who said it.

(Deposition of John E. O'Hern.)

The WITNESS.—Mr. Hamilton and Mr. Hemple were doing the talking, but Mr. Hamilton was doing most of the talking.

Mr. KIZER.—Q. They were together, were they?

A. They were together at this first conference, and they indicated that they had not given anybody any authority to sell their stock, and if the stock was sold they were going to sell it themselves; said they would like to sell direct to Armour & Company, and I said I did not see any objection to that, although the matter was being handled by Mr. Robbins, and that I would speak to him about it. I said, "In the meantime, you folks had better set a price on it so I can talk to him intelligently on it." They started asking a price—I think, although I am not certain about it, somewhere around $250 a share, and I told them that we could not consider anything like that, that I was told [68] by Mr. Robbins he had an option on the stock to buy it at $220 a share, and they said they had given no authority to anybody to sell their stock at $220 a share. I said, "All right, I just wanted to ask you before I say Mr. Robbins, what you want for your stock?" They got talking around, trading around—not necessarily trading, but discussing the value of the stock. I told them I was not satisfied the stock was worth the values they were setting on it. There was some assets there that might be of some value in addition to the stock. My notion of the stock was that it was not worth it. Of course, the usual trading, discussion that would ensue. I finally left them, when they had come down to about $220, and I

(Deposition of John E. O'Hern.)
told them I would take the matter up with Mr. Robbins. Mr. Robbins advised me that he had no objection to trading direct with them at all, but as far as price was concerned, why, to go further with them and see what I could do. They came around, wanted to sell their stock—pardon me, I had better go back a little further.

Mr. Robbins indicated, however, that he was not going to buy Hamilton's and Hample's stock without getting Stanton's stock, or somebody's stock sufficient to get a majority interest in this company. I advised them of that when I went back and told them that Mr. Robbins would deal with them direct if they would agree on price, and they said they were willing to sell if they could agree on price, and I told them that Mr. Robbins was not going to buy Stanton's stock by itself, or their stock by itself. My suggestion was that the three of them get together as to whether they were going to sell or not, and then we would deal with each one individually as to their stock. They advised me that they had some conferences with Mr. Stanton, and I think we had two or three conferences in the period intervening. They came back a day or so before the deal was finally closed and said to me they were willing to sell their stock for $200 a share provided [69] Stanton got no more for his stock than they got for theirs; and I advised them that there was some features in connection with this deal that I wanted cleared up. Mr. Robbins had indicated in a conversation that I had with him that he was not going to buy this stock without some guaranty that

(Deposition of John E. O'Hern.)
the book accounts—that was usual in buying stock—that those book accounts be guaranteed. There was book accounts amounting to over $350,000 there, that we wanted some guarantee on them, and asked them if they were willing to guarantee it. They said no, absolutely, they would not. I told them we also wanted that Mr. Stanton would not go into business in the immediate vicinity for a limited period of time, and if they would guarantee that he would not do it. They said they would have nothing to do with that; wouldn't do that. We told them we wanted Mr. Stanton's services for a period of from three to six months, possibly constantly, and for at least a year in an advisory capacity, or subject to our call if we needed it. I asked them how they felt about that, and they said they would not assume any responsibility for that. We told them we felt it was necessary to have Mr. Stanton stay with us for that period of time, that we were entire strangers in that community; that his knowledge of the plant and local organization, customers, distribution of its products, the marketing of its products, and the buying of his livestock, as well as his acquaintance among the livestock buyers was considerable of an asset; acquaintance among the livestock buyers was a larger asset in the Spokane plant than it would be in ordinary plants where we buy direct on the market. He was then buying direct from the producer. We also told them that in the meantime I had learned that there was a dispute about some commission on an option that we had when we came there, and that there was an argument about

(Deposition of John E. O'Hern.)

that. They said, "We didn't known anything about it, we won't pay any commission on any option; we had no authority to make any, and [70] we won't assume any responsibility on it." "Well," I said, "under those circumstances, I am going to be candid with you. If we buy this plant from Stanton, we are going to pay him more money for those features. We are not going to buy the plant—at least Mr. Robbins advises me he will not, unless those features are taken into consideration." They asked me then how much more Stanton would get for his stock, and I told them that was a question we would have to consider personal. In the first place, I did not know, whilst Mr. Robbins had expresses an opinion as to what he would do in the matter; that we had come to no conclusion with Mr. Stanton, and we did not know just where we would get at that, but anyway it was a matter I wanted to be frank with them and tell them they were not going to get the price Mr. Stanton would, or we would not purchase from Mr. Stanton unless we got an agreement from him that he would guarantee these accounts and accede to these other features Mr. Robbins had indicated.

During this interval I had been inspecting the plant, estimating the stocks, looking over the property and forming estimates on property and real estate, and we had an accounting man go through the books, and Mr. Robbins and Mr. Scribner and myself were in conference a couple of times a day, or at least, every evening, analyzing the result of Mr. Scribner's and my investigation.

(Deposition of John E. O'Hern.)

Mr. Stanton was holding off for what I thought was excessive prices for the features we were asking for, such as a guaranty of the book accounts and the other features. He finally agreed that in the event the deal was made he would assume all responsibility for the book accounts; he would stay with us, subject to call for a year, and stay two or three months longer on the plant every day we desired. [71]

Q. Was there anything in the agreement about his staying out of this field of endeavor for a while?

A. Yes, I spoke to him about that. He said there was no danger of him going into that business. He said, "I am selling out to get out. I have never been more successful in my life than I have been in the last two or three years, and I don't want to stay in this business, and prices are high and I don't know of any better time to get out than now. I will be candid with you and say that I would not sell out if I saw any prospects of continuing this business with my son taking ahold of it. But," he said, "he did not seem to be inclined to it," and he had been hammering away on it for a number of years, and he felt that he ought to take a rest, and he could not leave the plant and do that. He said he would be willing to guarantee that because he was going out of the business for that reason.

From the conferences I had with Mr. Stanton I had reported to Mr. Robbins that I thought we would not have much trouble in getting together with Mr. Stanton. Mr. Stanton had indicated that he wanted a price that was in excess of the option price, but that I had

(Deposition of John E. O'Hern.)

shown him how ridiculous it would be for Mr. Robbins to make any deal and to go back to Chicago and pay any price that would be in excess of the option price that was originally agreed upon. Finally Stanton says, "I will tell you what you do," he said. "I don't think we will have any trouble trading. There are some few things we can give and take on. You fellows are on the square. We will be able to trade." So I reported that to Mr. Robbins. Mr. Robbins said, "All right, see the other fellows and see what they want to do."

The WITNESS.—I know they came in one morning, Mr. Hample and Mr. Hamilton. I know they came in in the morning, accompanied by Mr. Stanton I believe. They said, "Well we are [72] ready to close up this deal; we will sell for two hundred, as we have been discussing." I said, "All right. Mr. Robbins handles that part of it; you will have to go up and see him." So I brought them up. In the meantime I telephoned Mr. Robbins. Well, I sent for Mr. Scribner, that they were down here and were willing to close up the deal and sell. He was up in his room. So that when they went up to the room the conversation from that time on was between Mr. Robbins and Mr. Hamilton and Hample and Stanton.

When I went to the room, Mr. Robbins was there; Mr. Hample, Mr. Stanton, and Mr. Hamilton accompanied me. Mr. Scribner came in later. I am not certain that Mr. Stanton was not there part of the time. After Mr. Hample and Mr. Hamilton had expressed their willingness to sell for $200 a share, Mr.

(Deposition of John E. O'Hern.)
Robbins said, "All right; there is nothing else to do but draw up the contract," and he said, "Your attorney will suit us"—Mr. Kizer.

We waited, visited around awhile until Mr. Kizer came over. He came over and got the terms of agreement and went back to his office and drew it up. I think it took maybe half to three-quarters of an hour or maybe longer while he was away, and we were visiting during that time. The contract, when brought back, was correct, I think, with the exception of one or two lines or one or two phrases that were eliminated, if I am not mistaken, because they had been discussing it pretty thoroughly and they were pretty well agreed upon what to do. I believe I suggested that maybe possibly on account of the mails that the date on which the stock was to be delivered at the bank,—we might not be able to meet it exactly, and that they had better extend that date, or something to that effect. I don't know whether that was actually made a part of the contract or not.

Then the agreements were all signed, and the suggestion was made that the stocks could not be deposited in the bank, and that the checks would come forward, and Mr. Hamilton handed the [73] stock over—offered it to Mr. Robbins, and says, "You might as well take the stock with you." Mr. Robbins said, "No, as a matter of business, you deposit it in the bank." Hamilton said he was willing to leave it with Mr. Robbins—

Mr. GRAVES.—I think that is unnecessary. He did deposit it in the bank.

(Deposition of John E. O'Hern.)

The WITNESS.—Yes. When that was concluded I remember a remark that Mr. Stanton made. He said, "Now, you fellows get out of here. I have got to make my deal."

Mr. KIZER.—Q. That is, he said that to Hample and Hamilton?

A. To Mr. Hample and Hamilton. Everybody laughed and shook hands, and they went out.

Q. Then did you make your deal with Mr. Stanton after they went out? A. Yes, sir.

Q. At the time they went out had there been a definite price agreed upon with Stanton for his stock and for the other considerations that he was giving?

A. There had been no definite price agreed upon. There was a trade being made on it. We were apparently close together.

Q. At that time what was he hanging out for?

A. He was hanging out for a round sum. He had mentioned a hundred thousand dollars. He had mentioned some other considerations.

Q. The question I was asking, Mr. O'Hern, was he holding out for this hundred thousand dollars in addition to the set price for his stock?

A. At this time I can't say whether—yes, in addition to stock, but I can't say at this time whether that was in addition to $200 or $220 a share for his stock. He knew what these other men were getting, and I had impressed on him at that time, before he came into the conference, that there was no use agreeing to deal unless he could go within the figures that Mr. [74] Robbins had mentioned to me, which was that

(Deposition of John E. O'Hern.)

he would not go beyond the option price—the aggregate option price for this stock.

Q. Then I take it that after Mr. Hample and Mr. Hamilton went out of the room you proceeded to dicker for his stock? A. Yes, sir.

Q. Just detail the course of those negotiations.

A. Well, the same features incidental to a contract were then discussed in a preliminary way with Mr. Stanton, particularly with reference to his staying with us in business, staying with us or being subject to call for a certain period of time, and for the use of his services during that time. With reference to the book accounts, the guaranteeing of them, he made a little objection to that, but Mr. Robbins pointed out to him that we knew nothing about the customers or his trade at all, and that we would insist on that; that there was too much on the books there for the small concern it was to think of taking a business over without knowing more about them, and they would not assume that responsibility. That was finally agreed upon.

In the trading, as it resulted, Mr. Stanton held out for the fact that he was not getting what he felt he ought to get. He suggested that this stock, some of this stock, should be bought cheaper, he thought, and Mr. Robbins said, "All right, if you can buy some of this stock cheaper, anything you get in addition to that we will take it off your hands at $220 a share." There was an automobile that figures were traded up and down for, and finally there was an automobile that entered into it that Mr. Stanton wanted for his

(Deposition of John E. O'Hern.)

son, which Mr. Robbins finally agreed with him that he could have.

(By Mr. KIZER.)

Q. That is an automobile which belonged to the plant? [75]

A. Yes. I think Mr. Robbins pointed out to him that there was a liability there, his personal account which was a feature. That was a company account which the directors had given him. That was an asset to him. That was something he had received that belonged to the company.

There was considerable trading, and they finally wound up and the figures agreed upon in there (indicating contract).

A. $576,400. Mr. Stanton was asking for more, but Mr. Robbins said it would be ridiculous to consider, that it would put him in a very ridiculous position to go back home and tell those people that he paid a larger price than the option originally called for.

Q. Mr. O'Hern, when was it you first saw Hample and Hamilton with reference to the date of signing the contract? Now, let me refresh your recollection if it will help any. You seem to be in some doubt about it. Isn't it a fact that on the morning this contract was signed Mr. Stanton brought them to your room and introduced them to you?

A. Oh, absolutely not. I had met those gentlemen a week before that. I believe you have reference to Mr. Robbins.

(Deposition of John E. O'Hern.)

Upon cross-examination, the witness further testified as follows:

There was no provision placed in the contract in regard to Mr. Stanton's agreement to give us his services so long as we should need them, for the reason that he had given us his word that he would do this and if later he decided he did not want to give his best efforts we had no way of making him do so whether it was in a written contract or not. In other words, if he was not willing to stay a contract would not hold him.

It appeared that the automobile which we let Mr. Stanton keep was one that had been used personally by Fred, and Mr. Stanton wished him to have it and we agreed that they would keep it. I am not certain whether a bill of sale was given or not. [76]

We put in the additional agreement that we were to pay Mr. Stanton $220 for more stock if he could get it because Mr. Stanton was demanding more than we were willing to pay. I told Mr. Hample and Mr. Hamilton that Mr. Stanton wouldn't sell his stock without somebody taking care of his commission and asked them if they were going to and they said no, that they had nothing to do with that; that Mr. Stanton could not sell their stock; that if they traded they would trade direct and that Stanton had no right to give an option. They talked about prices in excess of $220 and I told them it was ridiculous to pay above that and that the book accounts did not show the stock worth above that amount.

(Deposition of John E. O'Hern.)

Q. No, I am asking about you, not about Mr. Robbins now.

A. All right; absolutely not. I had met them all a week ahead of that.

The witness further testified that he met them in the hotel lobby, that he was uncertain whether Mr. Stanton or Mr. Kamareth introduced them to him or whether they introduced themselves; that he knew of the option and knew how many shares were stated in it, but that he did not now recall the number. He further testified that he checked up on the list of stockholders and that he assumed at first that Stanton owned the stock; that he was then informed to the contrary by Mr. Robbins; that afterwards he asked Mr. Stanton about it and that Stanton told him that a couple of partners of his who had originally been in business with him owned the stock, and he mentioned that he had no doubt that there would not be any trouble about selling their stock, that they were willing to sell.

The witness further testified that subsequently they bought all the outstanding stock of the Stanton Company, but that he does not know the price paid for it, as he did not himself complete the deal; that he had not looked into the books to see the total investment for that stock and could say nothing about it. Stanton had told the witness that Hample and Hamilton were coming to town; that between that time and the time they signed the contract Mr. Stanton talked to the witness about it; told the witness he was negotiating with them; did not tell [77] him what information he

(Deposition of John E. O'Hern.)

was giving them, that is to say, what information he was giving them concerning the deal between him and the Armours. He did not negotiate with them in Mr. Stanton's presence except at the time they signed the contract. They did not appear to be especially interested in what he was getting. They did not refer to the matter again after the talk in which he had told them that Armours was going to pay Stanton more than the others. He informed them two or three days before the deal was finally made that he would not deal with them on the basis he had dealt with Stanton. He did not tell them that anybody in the company was getting more than they were getting, did not tell them that everybody in the company was getting more than they were getting; he could not—did not know it; did not tell them that they were going to agree with Stanton to pay everybody in the company more than they were paid; did not tell them this after he found it out; did not put in anything about Stanton staying out at the plant for two or three months because they just took his word for it; did not have any separate contract with him for that; had no other writing with Stanton except the contract in evidence. Leaving it out of the contract was not discussed. Stanton said that night he would do it willingly without a contract and that if he was not willing a contract would not hold him. Mr. Kizer made no suggestion of putting it in; talked with Mr. Robbins about it.

The witness further testified as follows:

Q. Now, do you mean to tell us that you went on

(Deposition of John E. O'Hern.)

and closed up your contract with Hamilton and Hample without knowing whether you were going to be able to close with Stanton and what the terms with Stanton would be?

A. Yes and no. Mr. Stanton and myself had come to an understanding. We were not very far apart. Mr. Stanton's last word to me was, "You know what I want and I know what you are willing to give. Now, we will be able to fix this up if [78] these other fellows want to sell their stock."

Q. At that time you knew you were willing to pay and were going to agree with Stanton to pay $220 a share for all stock that he could get hold of no matter what it cost him? A. When and what time?

Q. At the time you told that to Hamilton and Hample. A. I don't know that.

Q. What?

A. I don't know that. We told him that he—I am not certain whether that was agreed to before or after.

Q. How long after you signed your contract with them did you sign up with Stanton?

A. About two or three hours; the meeting was continuous. I think we went out to lunch in the interval, or something like that, while the attorneys were drawing up the papers.

The witness further testified that amongst the notes payable was an item due by Stanton to the company for $25,000. The old directors of the Stanton Company voted to release him from it, to cancel it. The witness didn't recall if he knew it was being done,

(Deposition of John E. O'Hern.)

but did know Mr. Robbins told him about it and told him it was an asset of the company, one of the features that entered into the trade.

The witness further testified as follows:

Q. Do you mean to say that they canceled that note without consulting you about it when you were so very anxious to have all the accounts and notes receivable guaranteed?

A. This meeting was held subsequent to the trade, as I recall.

Q. Where was it held?

A. I don't know; my impression is it was held subsequent to any trade. [79]

Q. Then if it was held subsequent to the trade, you agreed to it, did you?

A. I don't know. I didn't know anything about is as near as I can recollect right now.

The witness afterwards said that he meant the meeting was held previous to the trade. His testimony then proceeded:

Q. How long previous to the trade?

A. I don't know.

Q. Were you cognizant of the fact that the meeting was to be held and what was to be done, and its purpose?

A. I don't know that I knew they were going to have a meeting even.

Q. Was the question of that assent discussed between Robbins and you?

A. Not until after it happened.

Q. Never was mentioned?

(Deposition of John E. O'Hern.)

A. Not that I know of until after it happened.

Q. They just went ahead and voted it out of the assets, although they had been trading with you?

A. I don't know.

Q. How? A. I don't know.

Q. You mean to say that Hamilton and Hample agreed to forgive the note, or whatever it was, of Stanton, without your knowing anything about it, and without the trade having been made or terms agreed upon, or anything?

A. Why, that is not an improbable situation.

Q. I am not asking you whether it is or not.

A. I am telling you I don't know about the meeting.

Q. Never heard of it? A. Not until afterwards. [80]

Q. Never heard about it?

A. No, sir; didn't know anything about it.

The witness further testified that nobody had ever mentioned the subject of that release to him and that he knew nothing about it. As to the automobile the witness further testified that they just agreed to turn it over to him; that there was no meeting of a board of directors on the subject and the other stockholders were not consulted. It was turned over outright to Stanton by him and Robbins; that there was no memorandum made on the books of the company.

The witness further testified that although they were going to stay within the $220 a share for this stock the price fixed in the contract with Stanton amounted to $238 and a fraction a share; that this

(Deposition of John E. O'Hern.)

figure was the result of trading. He then testified as follows:

Mr. Robbins had told me on Saturday that under no consideration would he agree to buy these shares where in the aggregate they would amount to more than $220 a share, or the option, and for that reason he judged it was useless to figure with Stanton on any other trade.

Q. For above $220? A. Yes.

Q. Well, but you did, though—now why?

A. I don't quite see that we did.

Q. Well, you agreed to pay him $576,400 for 2420⅔ shares; that is what your contract reads. I am talking of what your contract reads, which, according to the figures you just made for me amounts to $238 and a fraction, and I expect that we took that ⅔ shares, which would amount to $239 and a fraction.

A. The exact result of the negotiations with him is not clear in my mind as to how that was arrived at. [81]

Q. All you know is what the contract shows?

A. I know that Mr. Robbins had in his mind what I told you.

Q. Did you figure what his goodwill was worth, his agreement not to enter into competition with you in the states mentioned in this contract?

A. You cannot put figures on goodwill.

Q. I say did you?

A. We recognized it as an asset.

Q. Did you get any figure on the amount of it?

A. Oh, no. I don't think any two men can agree

(Deposition of John E. O'Hern.)

on what the value of goodwill is.

We did not put any figures on Stanton's services, although they had in mind what they would pay a manager; did not put any figures on the guarantee of the accounts, which amounted to about $350,000; that he had been informed at the office that Stanton had paid $5,000 in one item and $18,000 in another, and had taken over the accounts.

He was to give all his time to Armour & Company for three months and be subject to call six months or a year.

The witness then further testified as follows: [82]

Q. The total contract price you agreed to pay Stanton was $576,400. According to your contract now he had 2420⅔ shares. Hample and Hamilton, 2192⅔ shares, which at $220 a share amounted to $1,014,860. But you had already agreed to pay Hamilton and Hample $200 for that. I have disregarded the fractions, which in round numbers amounted to $438,400. Subtracting that from the total you have $576,400, or just $60 more than the contract price you agreed to pay Mr. Stanton for his 2420⅔ shares. I have no doubt if the figures were accurately made it would amount to just that sum. There is a fraction comes in there which I have disregarded in getting up these figures. Now, are you prepared to swear upon your oath that that is a mere coincidence? A. I am not.

Q. Are you, then, prepared to admit that Stanton's stock was figured on the basis of $220 for his and $20 a share for Hample and Hamilton's?

A. It could not possibly be done that way when

(Deposition of John E. O'Hern.)
he assumed the obligations and the automobile entered into it and his services entered into it; that was not the full amount we paid him. [83]

Q. Why is it it comes out that way,—is it just a coincidence?

A. I can tell you what I replied before—that Mr. Robbins said he was not going beyond the contract price of the stock he bought in this city and he would not go beyond it.

After some other questions and answers, he testified as follows:

Q. You do not quite get the force of my question, I see, Mr. O'Hern.

A. Possibly not.

Q. What we charge to be the fact in this lawsuit and what I am trying to get at is that you paid Stanton in figures now—I don't care what you call it—you paid him in figures $220 a share for his stock and $20 a share for Hamilton and Hample's stock. Now you say that was not so, do you?

A. I say it was not so because the facts are here in the contract.

Q. I don't care about the reason.

A. The contract does not read that way.

Q. I understand. Is that all you know about it?

A. I know what the contract reads here and I know the prices and figures we agreed upon.

Q. Precisely so.

A. It may have amounted to that much, but that was not—

Q. You have said to me that you did not figure any

(Deposition of John E. O'Hern.)

particular amount that his goodwill was worth by staying out of business in these states, you did not figure up any particular amount that his services were worth though you had in mind the general notion of what you would have to pay a man, and you did not figure up any particular amount of what his guarantee of the outstanding accounts, bills and notes receivable was worth, but [84] it was kind of lumped together. I think that is stating your answer. Are you certain now, sir, in figuring this, getting up that sum, you did not take as your basis $220 for his stock and $20 for Hample and Hamilton's stock? A. You mean to arrive at his $576,400?

Q. Yes.

A. It is possible that is what the result of that was.

Q. That is the way you figured it?

A. Well, as far as that being the way we figured it, I had this in mind.

Q. Pardon me, Mr. O'Hern, but I am not particular about what you had in mind. I say is that the way that Stanton Robbins and you figured it?

A. I say positively no, I did not, if you want a direct answer.

Q. Then, will you please explain to me why it is that the figures come out that way. Is it just a mere coincidence?

A. It was not a coincidence. You would not let me tell what I think brought it about, and for that reason—

Q. All right, you may tell that now, if that will help us any.

(Deposition of John E. O'Hern.)

A. Mr. Robbins had set his mind on this fact; that he was not going to pay anything in excess of the amount that he had originally come out there to pay for stock, for buying a majority control of the stock in that plant.

Q. Well, had he set his mind that he would go the full price fixed in that option?

A. Not when he went out there.

Q. No, but when he made this contract.

A. As a result of my report to him he had set his mind on it that he would go that full price and buy it as much cheaper as he could. [85]

The witness further testified as follows:

Q. Now, will you admit, Mr. O'Hern that, whatever your intention was—I don't care anything about that—but as a fact, that in this contract you say you made with Stanton, he was given the benefit, under whatever name you called it, of precisely $20 a share on the Hample and Hamilton stock?

A. Personally I had in mind that we had that advantage in the other trade and that we had that much to trade on in trading with Stanton; yes, sir.

Q. Yes. Therefore, then, you intended to pay Stanton and Stanton intended to get $220 a share on the Hample and Hamilton stock?

A. Your question that I intended or he intended to get is not correct.

Q. That was the purpose, wasn't it?

A. Well, what we did and what we intended are two different things. What we finally agreed on was the limit that we were to go.

(Deposition of John E. O'Hern.)

The witness further testified that the sum of $576,400 was reached by paying $220 a share for Stanton's stock and $20 a share for Hample and Hamilton's; that was the basis because it was the point which Mr. Robbins said he would not go beyond.

Q. Did he tell you the amount of that commission—five per cent? A. I don't think he told me.

Q. You were informed of that in the option; it is stated in there?

A. It is possible I was, and I won't deny that I did see the option. I don't recall right now. [86]

Q. Two per cent—I beg your pardon, yes, two per cent. Pay you two per cent commission for selling the stock.

A. It is possible I saw that, but I do not recall.

Q. You said something to Hample and Hamilton about that, you say?

A. I told them, I said, "You fellows are arguing here, the three of you are in a scrap; you want to sell us your stock, and Mr. Stanton won't *w*ell us his stock without somebody taking care of his commission." I said, "Are you going to take care of this commission?" He said, "No, we have nothing to do with it. We won't sell it. We won't trade under that condition."

Q. That was on the basis of 200?

A. On the basis of the option. They said Stanton could not sell their stock, they would not trade, that is buying through Stanton at all. "If we would trade, we would trade direct. Stanton had no right to give an option."

(Deposition of John E. O'Hern.)

Q. Did you tell Hample and Hamilton that this outstanding option that Stanton had given on 5084⅓ shares was at $220 a share?

A. It is possible I did, although I don't recall that I did. I think I mentioned it, because when they asked about prices in excess of $220 a share I told them it was ridiculous and that we would not think of paying anything above the 220; that we came out here on what I understood was an option for 220; and would not consider it. They repudiated the option then. [87]

Q. You said you would not pay above 220 and thereupon they shortly turned around and took 200?

A. Please give me that question again.

Q. I say and thereupon they shortly turned around and took 200?

A. I told them the maximum price that we would possibly pay would be 220, and we were going to buy as much better as we could. I further told them that the book accounts did not show the stock was worth that much.

Q. Did you? A. Yes, sir.

Deposition of George B. Robbins, for Defendant.

GEORGE B. ROBBINS, called and sworn as a witness for defendant, his testimony being taken by deposition, testified as follows upon direct examination: [88]

I am vice-president of and a director of Armour & Company. I was in Spokane on May 21, 1917, and saw Mr. Hample and Mr. Hamilton at the time the

(Deposition of George B. Robbins.)

contract between Armour & Company and Hamilton and Hample was signed.

After that contract was signed Mr. Stanton said to them in effect that if they would leave he would proceed to make his contract with us.

Upon cross-examination the witness further testified as follows:

My maximum of what I wanted to pay on this stock as a whole was $220 a share. While the option itself had elapsed in my opinion, I knew the people at home had that figure fixed in their mind and I thought I would have to let the trade drop rather than have paid any more than that for the stock.

I found that Mr. Stanton was not willing to take $220 for his stock. He had refused to do so in view of the guarantee and the limitations which we required to be a part of the trade. When I was told by Mr. O'Hern that Hample and Hamilton would probably take $200 for their stock, I could see a chance to trade increasing the payments to be made to Mr. Stanton.

When Mr. Hample and Mr. Hamilton came to my room that morning I said, "I am informed by Mr. O'Hern that you are willing to take $200 for your stock." One of them said, "Yes, sir." I turned to the other gentleman and asked the same question. He said, "Yes, sir." "Well," I said, "I guess there isn't any occasion to prolong this meeting. We will sent for an attorney and let him draw up an agreement to that effect."

Mr. Stanton wanted $100,000 more or less for the

(Deposition of George B. Robbins.)

other things and I explained to him that I would not under any circumstances pay over the average of $220 for the stock. If Hamilton and Hample had demanded $220 for their stock from me there would have been no trade. The thing would have ended there and there would have been [89] trade and we would have gone home. If I got the stock of these two men I could have gotten a control of the stock without Mr. Stanton.

Testimony of E. H. Stanton, for Defendant.

E. H. STANTON, the defendant, called on his own behalf, testified as follows:

I am 59 years of age and I have been in the meat business 25 or 40 years in New Hampshire, Colorado, Montana and Washington. I met Mr. Hample and Mr. Hamilton while in Montana and then afterwards I came to Washington. I think it was in 1888. I started a retail butcher-shop in Sprague, Washington. In 1896 I came to Spokane and started a butcher-shop and in 1904 I started the E. H. Stanton Company with a capitalization of $150,000. In 1906 Mr. Hamilton and Mr. Hample and Mr. Montgomery bought 750 shares of stock and paid par for it. Of that $75,000, $55,000 went into the treasury of the company and the balance went to me. Hamilton and Hample have been stockholders ever since. Montgomery afterwards sold out. In 1909 the capital stock was increased to $600,000 and the stockholders were paid a stock dividend of $350,000. In 1910 we built a large packing plant east of the city.

(Testimony of E. H. Stanton.)

In 1912 Mr. Hample, Mr. Hamilton and myself each bought $25,000 worth of the treasury stock and paid cash. I borrowed $25,000 to pay for mine and later I borrowed money from the company and gave my note in order to repay the note. Mr. Hample and Mr. Hamilton knew of this and never made any complaint. During this time I was sole manager. I went to work at the plant at 5 o'clock in the morning and left there between 6 or 7 o'clock in the evening, week days. I observed the Sabbath; I went to work at six o'clock on Sunday and left there about two o'clock. Mr. Hample and Mr. [90] Hamilton had nothing to do with the management of the business. They came over to Spokane from time to time and I would tell them as near as I could all about everything and all about the business. From 1906 until I sold out I was drawing a salary of $300 a month.

My attention was called to the prospective sale to Armour & Company about the 8th day of May, 1917. A short time before that I had given Wilson & Company an option on the stock at $200 a share and they turned it down. On May 8, 1917, Mr. Fred B. Grinnell brought it to my attention that a sale might be made with Armour & Company and I gave him an option on a portion of the stock.

On Monday, May 14, 1917, Mr. Robbins, Mr. O'Hern and Mr. Van Kleek, Mr. Grinnell and Mr. Irvine came out to the plant. Mr. Robbins returned to town and Mr. Van Kleek and Mr. O'Hern spent the entire day looking over the plant. I did not go with them

(Testimony of E. H. Stanton.)

and there were no negotiations that day about a purchase.

About 9 o'clock the next day Mr. Robbins and Mr. O'Hern came out and said that they had decided they were not interested in the option; that the stock was not worth $220 a share; and that they did not have the cash to buy the plant. They said that they thought there was no need of any further investigation; that they had decided to go to Seattle that night and expected to see Mr. Fry. I knew that Mr. Fry was in the market to sell his plant in Seattle. I suggested to them that I go over to Montana and see Mr. Hample and Mr. Hamilton and if I thought things looked in shape to make a trade I would send them a telegram, and they agreed to that. They said they would stop at the Hotel Fry, in Seattle.

I went to Butte that night and saw Mr. Hample and Mr. Hamilton the next day. I explained to them that there was a prospect of making a sale to Armour & Company; that conditions were unsettled; that livestock was going higher and that we had a big stock of frozen meat on hand; that a lot of repairs had to be made [91] which would cost not less than $150,000. I told them I thought it was a good time to sell out. I told them that Armour & Company had 7 or 8 wholesale markets, one in Portland, Seattle, Tacoma, Los Angeles, Bellingham and Butte, and that they needed a plant in this part of the country to supply these houses and that if they couldn't buy our plant the chances were that they would build one of their own. I told them that if they did build here Armour & Com-

(Testimony of E. H. Stanton.)

pany would be a hard competitor. We discussed how much harder it would be to do business and they seemed to agree with me. We talked about six hours. Before I left that night we decided to take $150 a share if we couldn't get any more.

About 12 o'clock that night the conductor came to my berth and gave me a telegram from Mr. Hamilton and Mr. Hample. The telegram read: "Positively do not sell out stock. We will attent to that ourselves."

When I reached Spokane in the morning I received another telegram from Mr. Hample. That one said, "Positively do not attempt to sell our stock. Jim and I will leave for Spokane to-night." Jim is Mr. Hamilton's first name.

After I returned to Spokane I telegraphed to the Armour & Company people to come back and they reached here Friday morning. Mr. Hamilton and Mr. Hample also reached here Friday morning.

When Hample and Hamilton came out to the plant I asked them if they thought I was going to sell out and skip the country. They said, "No, we didn't think that, but we thought you were getting cold feet, and we thought we would come over and tend to this business ourselves."

I told them I was going to sell out and that they could suit themselves. If they wanted to sell they could but I was going to sell mine anyway.

I took Mr. Hamilton and Mr. Hample around through the [92] plant and showed them everything. I didn't tell them I would sell their stock for them. I didn't feel that way about it right then,

(Testimony of E. H. Stanton.)

nor did I tell them I would get as much for their stock as I did for my own. I didn't conduct any negotiations for them with Armour. They did their own negotiating themselves.

Friday there was nothing further said about a sale. Mr. Van Kleek and Mr. O'Hern were looking over the plant. Saturday morning they said to me that they thought Hample and Hamilton would sell their stock at $200 a share, and I said, "I am glad to hear that." Sunday morning they came out to the plant again. Mr. O'Hern said they thought they could make a deal with them and that he would like to see me at the hotel that evening at about seven o'clock.

I met him accordingly and we talked the matter over quite fully. He said that they had concluded to take our stock at $200 a share but that they wanted me to agree to stay out of the meat business in this part of the country and to guarantee the book accounts and to also remain and assist them at the plant for a time. That didn't sound very good to me and finally he said they might consider giving me a small consideration for that and I told him I would let them know the next morning.

Monday morning Mr. O'Hern came out to the plant between 7 and 8 o'clock and I told him I would do what they wanted for $100,000 in excess of what they wanted to pay for the stock. Mr. O'Hern said that he was sure that Mr. Robbins would not consider such a proposition for a minute, but that he would go back and see what he said about it. He went back to town and at about 11:30 that forenoon called me over the

(Testimony of E. H. Stanton.)

phone and asked me to come down to the hotel at about 2 o'clock.

Hample and Hamilton were out at the plant at that time and I told them I thought Armour & Company were figuring on [93] closing up with us and that they wanted us to come in, so we all went down and met Mr. O'Hern in the lobby.

We went up to Mr. Robbins' room and Mr. Robbins said that Mr. O'Hern had told him that Mr. Hample and Mr. Hamilton had agreed to take $200 a share for their stock, and they said they had, and he said he guessed that was all there was to it. We called up Mr. Kizer and he came over and got the terms of the contract and went back to his office and drew it up.

After the contract was signed, I said, "Now, you fellows go on downtown. I will try and make my deal," and as they were going out they said jokingly, "These folks have a lot of money; make as good a deal as you can."

After they had gone out Mr. Robbins told me that they could not consider paying me $100,000 in addition to paying for the stock, since that would run the purchase price considerably over the option which I had given them, and that Mr. Armour would think they were mighty poor traders.

I told them that I was willing to live up to my agreement to sell my stock for $200 a share but *he* that they could not afford to buy my stock and then have me go into the meat business again. Finally Mr. O'Hern suggested that we figure the price of the stock at $220 a share and upon counting it up that

(Testimony of E. H. Stanton.)

came to a little over $92,000.00 and I told them that was not enough, so they offered to throw in the little Packard automobile, which I figured made a total of about $95,000, and I stated to them that $100,000 was my price. Then one of them suggested that they would give me four of five months to pick up the balance of the stock and would pay me $220 a share for it. I concluded that was about as good as I could do and about all I could get so I accepted that. This contract has been fully compiled with to date. [94]

At the time of the trade the book accounts amounted to about $350,000 and up to date I have paid Armour & Company $22,534.00 on bad accounts and in addition defended a lawsuit upon one of them. I actually stayed out at the plant about two months and rendered services in an advisory capacity up to about a week or ten days ago. Whenever they asked me any questions I answered it.

On the Saturday afternoon while Hamilton and Hample were in Spokane I told them I would like to have the note cancelled because they could sell their stock for just as much money with that note cancelled as not. I told them that I had worked pretty hard and I had been successful and had made them quite a lot of money, and they said it was absolutely all right with them.

I talked it up with Fred and he talked it over with Mr. Hamilton and Mr. Hample and drew up a resolution which was passed before Armour & Company knew anything about it.

(Testimony of E. H. Stanton.)

Upon cross-examination the witness further testified:

When I went over to Butte to talk the matter of selling over with Hamilton and Hample I didn't know whether we could get more than $150 from Armour & Company, but I was willing to sell for that price if I couldn't get more. [95] Hamilton, Hample and myself agreed that we would not take any less. We talked the matter over fully as to the resources of the company and our future prospects. We talked as fast as we could while I was there.

When they showed up Friday morning Fred brought them out to the plant and I spent most of the day showing them over the plant.

Q. Did you say anything then about the $150?

A. Well, we kind of—after they looked around, had their sights raised a little bit.

Q. Did you raise your sights? A. Yes.

Q. So you both agreed you would raise your sights right there, did you?

A. I was going to get all I could.

Q. You both agreed to raise your sights right there did you, if you could?

A. They said they thought they ought to have more money. I don't know whether I agreed to it or not, but they both said they did.

Q. What did you advise them about that?

A. I did not advise them.

Q. Was anything said about how much more they wanted? A. No, sir. [96]

Q. Did you say anything to them about what you

(Testimony of E. H. Stanton.)

thought Armour would stand on this sight raising?

A. No, sir, because I didn't know. We might have discussed it a little, but I don't recollect. I don't know as we did. We didn't do very much talking about the weather, or anything. We did more signing. I took them out to my house that night and they stayed there, put in the evening there. I didn't say anything to them very much about the stock. We might have talked it in a general way. They might have asked we what Armour's would give. I told them I didn't know. Nothing was agreed to. They got breakfast there the next morning. I went to the plant. They were at my house when I left. I saw them Saturday morning at the plant about 10 o'clock. They were there the biggest part of the day. Spent the day looking over the plant. I was not with them. They were there all day. Saw O'Hern and Robbins that day. I didn't talk trade to them that day. Hamilton and Hample didn't say anything about trade that day that I know of. There was no discussion between Hamilton and Hample and me on Saturday. Robbins wasn't there. O'Hern and Van Kleek were measuring up the frozen hogs and beef. They were pretty busy at it most of the day, and Hamilton and Hample stayed there all day, or at least most of the day. I don't know where they went. They didn't say anything to me about it. I next saw them Sunday morning at the plant about 10 o'clock. I was there a few hours in the morning. Stayed there probably until 2 o'clock. All we did there was to have a picture taken. They were at my house for

(Testimony of E. H. Stanton.)

dinner. I am not sure whether they went in the machine with me and Fred or whether they went from the hotel. We had dinner about 3 o'clock. While at my house, I don't know that anything was said about trade. I don't remember of any conversation on that subject. They left my house about 4 o'clock on Sunday. [97] Fred and a young lady whom he afterwards married took them in the car and took them out riding. I don't know where they went. I went over to town with them and got out. I saw them at my house Sunday night. I don't know what time they got back; I am not sure about that. We might have said something about the trade that night, but I do not remember it.

The witness then testified as follows as to the transactions of that night:

Q. Did they ask you how Armour & Company was acting, whether they were going to come across?

A. At that time it was our impression that they was.

Q. I am not asking you about your impression; I am asking you if those men asked you?

A. That was about three—that was over three years ago, Mr. Graves. It is pretty hard for me to remember.

Q. You remember a lot of things and I thought you might remember this.

A. Just the principal things.

Q. The discussion wasn't part of it?

A. We had so much discussion.

(Testimony of E. H. Stanton.)

Q. But you didn't have any discussion about the price, you have told me.

A. Oh, we was talking.

Q. I know you were talking, but I am asking you about discussion about price. Did you have any discussion about price?

A. We were talking probably about $200 a share for our stock.

Q. Probably? Don't you know whether you were or not?

A. They never made us an offer on that at that time.

Q. Wasn't Hamble and Hamilton and you discussing it?

A. Yes, we might have been; to satisfy you Mr. Graves, [98] I will say this: We might have been.

Q. Don't say it to satisfy me. Tell us the truth,—never mind me.

A. I don't know.

Q. Did they ask you whether Armour had made you a price? A. I don't know that they did.

Q. Did you ask them if Armour had made them a proposition? A. I don't think I did.

Q. And you didn't tell them whether Armour had made you a proposition? A. I did not.

Q. And they didn't tell you whether Armour had made them a proposition?

A. I don't think they did.

The witness then testified:

A. Hamble and Hamilton stayed all night at my

(Testimony of E. H. Stanton.)

house. I saw them at 10 o'clock the next morning at the plant.

Q. Anything said then about the price?

A. I would not say there was.

Q. Did they ever ask you whether Armour had made you any offer or not? A. No, sir.

Q. Did you tell them whether they had paid you or they tell you whether they had paid them?

A. I don't think so.

Q. Wasn't mentioned in any way? A. No.

Q. When was it you went to town?

A. About 1:30. [99]

Q. Got in the machine, did you, together and went to town? A. Yes, sir.

Q. And you told them Armour, you thought, was about ready to deal? A. Yes, sir.

Q. And you three men at their request were going down to the Davenport Hotel to meet Armour to close this deal involving over a million dollars?

A. We went there with the expectation that we were going to get the $200 a share for our stock.

Q. I say it involved over a million dollars and I suppose you discussed very anxiously, you three men, as you rode toward town what you would probably get, what Armour had to offer, and so on, did you?

A. I don't recollect that we did.

Q. Never mentioned it?

A. Might have mentioned it; yes.

Q. But did you?

A. I would not say that we did.

Q. Will you say you did not? A. No.

(Testimony of E. H. Stanton.)

Q. And as far as you recollect you just rode solemnly into town to clean up something over a million dollars and you never talked about it at all, and up to this time neither one of you knew what the other had been doing—is that it?

A. Practically, I think, yes.

Q. Practically? A. Yes, sir.

Q. All right, practically, then. [100]

STIPULATION.

It was thereupon stipulated by the parties in open court that the Rutter stock of 40 shares were purchased for Armour & Company by Mr. Van Kleek in August, 1917, for $200.00 and the Franklin stock was purchased in September, 1917, for $200 per share.

(There was thereupon admitted in evidence, without objection, the annual statement of the E. H. Stanton Company, for the year 1916, a copy of which was sent to Mr. Hamilton and Mr. Hample in January, 1917, said statement being marked Defendant's Exhibit No. 4.)

The material portion of said statement is as follows:

Defendant's Exhibit No. 4.

STATEMENT—E. H. STANTON COMPANY.

December 31st, 1916.

RESOURCES.

Real Estate, Blegs. & Equipment	$683 900 13	
Stocks	63 283 33	$747 183 46
Merchandise	465 658 62	
Accounts Receivable	240 769 02	
Notes Receivable	25 660 00	
Cash	8 647 15	740 734 79
		$1 487 918 25

LIABILITIES.

Notes Payable	377 000 00	
Accounts Payable	38 133 62	415 133 62
Capital Stock		600 000 00
Surplus		472 784 63
		$1 487 918 25

[101]

Testimony of Don Kizer, for Defendant.

DON KIZER was called and sworn as a witness on behalf of defendant and testified as follows:

Direct Examination.

I have been practicing law in Spokane 16 years and have done considerable business for the E. H. Stanton Company. I knew nothing of the proposed sale of stock of that company until the 21st day of May, 1917, when Fred Stanton called me about 2 o'clock in the afternoon to come over to a certain room in the Davenport Hotel. I went there and met Mr. Hamilton, Mr. Hample, Mr. Stanton, Mr. Robbins, and Mr.

(Testimony of Don Kizer.)

O'Hern. Mr. Robbins informed me that he had agreed to buy the stock of Mr. Hample and Mr. Hamilton for $200 per share, payable in five installments. Part of the purchase price was to be paid in notes and we figured the amount of the notes and the dates. Hamilton and Hample said that they had no objection to reducing the cash payments in order to make the notes come out in even figures; that money was no particular object to them and that 5% interest was better than they could get out of Liberty Bonds. While we were talking Mr. Scribner, the auditor for Armour & Company, came in and handed a slip of paper to Mr. Robbins. Mr. Robbins, upon reading it, inquired if it was true that they had given back a $25,000 note to Mr. Stanton which was one of the assets of the company, and someone, I think it was Mr. Stanton, said, "Yes," and Mr. Robbins remarked that that was hardly fair right on the eve of a trade. Mr. Hamilton or Mr. Hample, I am not certain which, said that Mr. Stanton had been out there ever since the organization of the company and had never been paid enough. That they had always told him he hadn't been paid enough and they thought he ought to have that note cancelled or something like that and that they had decided to do so. After some further remarks Mr. Robbins said, [102] "Well, that isn't going to stop the trade."

I went back to the office and drew the contracts and returned with them. Upon my reading them Mr. O'Hern called attention to the fact that it was provided "Time is of the essence of this contract" and

(Testimony of Don Kizer.)

that the time allowed in the contract was scarcely sufficient to enable them to have the draft in Butte, so that phrase was stricken out and Mr. Hamilton and Mr. Hample said it didn't make any difference to them.

After the contracts were signed Mr. Hamilton made some remark about there being no use of carrying this stock back to Butte; that they would just as soon let Mr. Robbins take it, and reached toward the inside pocket of his coat, and Mr. Robbins replied that they preferred not to do business that way.

After talking a few minutes Mr. Stanton said, "You fellows go on downstairs; I want to make my deal now." They both laughed and prepared to leave and one of them said, jokingly, "Get as much money out of Armour as you can; he can afford it."

Mr. Robbins then told Mr. Stanton that he thought his price of $100,000 for staying out of business, guaranteeing the book accounts and assisting Armour & Company in the management of the plant was out of the question. That they had come west with an option to buy the stock at $220 a share and that if they paid Mr. Stanton this amount it would make the aggregate more than the amount of the option and that he didn't have the nerve to report back to the Chicago office after doing such a thing.

Mr. Stanton said, "You have offered me $200 for my stock and I will take $200 just as I agreed, but now you are speaking of something else and that is a horse of a different color. If you want it you will have to pay for it." There was considerable argu-

(Testimony of Don Kizer.)

ment and conversation. Mr. Stanton insisted that he would either sell his stock for $200 a share or he would sell for $200 and for $100,000 additional would stay out of business and guarantee these bills. [103]

Mr. Robbins suggested that they would rather risk buying the other outstanding stock and keeping Mr. Stanton with them than doing that because he was acquainted with the trade and they didn't care to have him for a competitor.

Mr. Stanton finally suggested that if they calculated the difference between $200 and $220 per share upon all the stock it would amount to close to $100,000.00. We all figured up on that basis and it came to $92,266.66 and Mr. Robbins said, "Mr. Stanton, that is just as high as we dare go." But Mr. Stanton still said that that wasn't enough. Then one of them, either Mr. Robbins or Mr. O'Hern, suggested that they would throw in the Packard car which had been talked about and Mr. Stanton said that would only make $94,000 or $95,000. There was a great deal of argument after that and trading back and forth and finally Mr. Robbins offered to agree to buy from Mr. Stanton all of the stock which he could pick up and pay him $220 a share for it and Mr. Stanton finally consented to that. I then outlined to them a contract figured upon the basis of the stock at $200 per share and $92,000-odd dollars for these other things. Mr. Robbins said it would be best not to put it in that way; that Armour & Company were always accused of being a trust and always trying to drive their competitors out of business and they didn't like

(Testimony of Don Kizer.)

to show any money consideration for that agreement and asked if it couldn't all be lumped in at that sum.

Then the question was brought up as to Mr. Stanton's agreement to stay out of business, and after some talk about how that provision should read Mr. Robbins said he didn't know that it was necessary, that if Mr. Stanton would not give the company his best efforts he would be no good to them and that if he was willing to do so it was not necessary to put it on paper.

On the 4th of June, I received a telegram from Mr. Robbins saying there was some trouble over the Hamilton stock. I telegraphed in reply that I knew nothing about it. I then [104] received a telegram, which is Plaintiff's Exhibit 16, requesting me to go to Butte immediately and arrange to have Mr. Hamilton comply with his contract or to bring action to compel him to do so. I went to Butte and reached there on June 6 and went to Mr. Hamilton's office. I found Mr. Hamilton and Mr. Hample there together.

Mr. Hamilton informed me that Armour & Company had not deposited their money and notes with the Clark Brothers Bank on the 25th day of May, and that he had drawn out his stock because of their failure; he also said that before he left Spokane, Mr. Fred B. Grinnell had told him and Mr. Hample that Mr. Stanton was getting $20 a share upon their stock and was getting $220 upon his own and they had become convinced that Armour & Company and Stanton had tried to cheat him. Mr. Hample said that was

(Testimony of Don Kizer.)

so and that if he had any way of getting out of it he would not have deposited his stock. I told them that I was going to start suit if Mr. Hamilton did not deliver his stock. Mr. Hamilton requested me not to start suit, that he had consulted one lawyer but that he preferred to consult another one. I told him I didn't like to leave Butte without some agreement being reached and he agreed to hold his stock until the 16th of June. I thereupon wrote out an agreement which he signed and which is Exhibit 11.

On the morning of the 15th I received a letter from Mr. Hamilton which has been admitted in evidence heretofore, and I went over to Butte. I reached there on the night of the 16th with the intention of starting suit. I had learned meanwhile that he had purchased 773 1/3 shares of stock belonging to the Overholt Estate.

When I reached Butte I went over to see Mr. Hamilton and found Mr. Hamilton and Mr. Hample together. At every conversation I had with him I found the two together. He told me that he had consulted Mr. Sanders and that Mr. Sanders had informed him that he had a perfect defense upon the ground of fraud; that the contract [105] had not been lived up to.

After considerable argument that day I wired Armour & Company for authority to make a deal for both the Overholt stock and the Hamilton stock and received the authority the next day.

I then informed Mr. Hamilton that we would give him $220 a share for the Overholt stock if he would

(Testimony of Don Kizer.)

sell his stock for $222 as originally agreed, but he refused to sell any of the stock for less than $220. I called his attention to the fact that he had bought the Overholt stock for $190 and that he would make a profit of over $22,000 on that alone. He said he was entitled to all the profit he could get and that he was going to get $220 for the other.

We had negotiations lasting over several days. I tried to purchase one group of stock from Mr. Hamilton, but he refused to sell one without the other. He asked various prices and finally came down to $205 per share for hi*w* own stock and $220 for the Overholt stock.

On the 18th day of June, I entered into a contract with Mr. Hamilton providing he would not sell his stock for a time. On the 22d of June, Mr. O'Hern reached Butte, and we told him we were going to bring suit, and I drew a complaint for that purpose.

Then we entered into a stipulation with Mr. Hamilton to deposit the stock, notes and draft in the bank.

Mr. O'Hern and I arranged to leave town that day and I arranged for another attorney to have the complaint served. We were walking down Main Street in Butte when we met Mr. Hamilton and we informed him we were leaving town that night. Mr. Hamilton said not to be in a hurry that we might reach an agreement yet and Mr. O'Hern said the best that they could do was to give him $200 for his stock and $220 for the Overholt stock and pay eight (8) per cent interest on $43,000 from May 25, and Mr. Hamilton agreed to take that. [106]

(Testimony of Don Kizer.)

The whole thing was closed up at once. The two bunches of stock were turned over to Mr. O'Hern and he turned the two drafts and the notes over to Mr. Hamilton. This was on June 23, 1917. Mr. Stanton gave me a writing waiving any right to sell this Overholt stock under his contract.

The witness further testified as follows upon cross-examination by Mr. GRAVES:

I am not certain whether I had delivered to Mr. Martin the identical draft that had been sent to Butte for him, but I delivered him the identical notes that had been executed by Armour & Company for the stock on the deal of May 21 in Spokane; that the original draft would be for forty-three thousand odd dollars. On June 19th, I gave him a draft for $34,-133.33 on account of the Overholt stock. I delivered him four notes executed on June 21, 1917; that $34,-133.33 draft was drawn in Chicago and the notes were executed there. Mr. O'Hern brought that draft and those notes to Butte with him. He got there on the 21st. These notes bore date the 21st. The handwriting on the dates is different and seems to have been inserted. The ink is quite different. The date June 21 is different ink. It looks as though the date had been inserted. My only reason for saying that is from its appearance. That applies both to the date of the note and the date on which it becomes payable. They might have been dated by O'Hern after he got there. They might have been mailed to him from Chicago. I do not know why they bear the date of June 21st instead of the 23d. I haven't any idea

(Testimony of Don Kizer.)

why the draft was dated on the 19th. I don't know whether Mr. O'Hern brought the draft with him. I don't know whether O'Hern told me he had the notes and draft with him when he came. I have no recollection at all as to whether the notes were made in Chicago, signed in Chicago, dated in Chicago, or whether the dating was done by O'Hern after he got there. I have no recollection as to why the draft was [107] dated the 19th and why the notes were dated the 21st. Neither recollection nor knowledge on this subject. I have no knowledge, no information, and nothing was told me or said to me about why the notes would be made on the 21st so as to bear interest for two days before the deal was actually made.

THEREUPON it was stipulated in open court that the copies of the notes could not be put in evidence, but that the original notes might be shown to the jury, might be used to the jury in argument for the purpose of aiding them in determining as to the dates in the notes being filled in in a different handwriting.

Before the Court instructed the jury the defendant requested the Court to give the following instructions:

Instructions of Court to the Jury.

INSTRUCTION No. I.

The theory of plaintiff's case as set out in the complaint is that the plaintiff authorized the defendant, E. H. Stanton, to sell his stock, and that E. H. Stanton agreed with the plaintiff to sell plaintiff's stock at the same price he sold his own stock and that the defendant falsely and fraudulently represented to plaintiff that the selling price was $200 per share, and

that in reliance thereon the plaintiff agreed to sell his stock to Armour & Company for $200 per share, but that the sale was in fact made by the defendant, and that the defendant received from Armour & Company upon the sale of plaintiff's stock the sum of $20 per share for said stock.

In order for the plaintiff to recover he must establish by a preponderance of the evidence the following things:

(a) That the plaintiff authorized the defendant to sell plaintiff's stock and the defendant agreed to sell plaintiff's stock at the same price he sold his own stock.

(b) That defendant did in fact sell plaintiff's stock. [108]

(c) That the price which Armour & Company promised to pay for plaintiff's stock was $220 per share, and not $200 per share.

(d) That Armour & Company have actually paid for plaintiff's stock the sum of $220 per share, paying $20 thereof to the defendant.

If the plaintiff has failed to establish by a preponderance of the evidence any of said matters, the plaintiff cannot recover herein.

INSTRUCTION No. II.

The defendant contends that he did not sell the plaintiff's stock, but that the plaintiff sold his own stock, and that the plaintiff fixed the price therefor, to wit, the sum of $200 per share. If the jury finds from the evidence that the stock of the plaintiff was sold by the plaintiff and not by the defendant, the

plaintiff cannot recover in this action, and your verdict must be for the defendant.

INSTRUCTION No. III.

The defendant contends that he sold the stock of himself and the members of his family, to wit, 2420⅓ shares, at $200 per share, and that the amount in excess thereof, as set forth in the written contract, to wit, $92,266.66 and a certain automobile were paid to him in consideration of his agreement not to engage in the meat business or any other business then conducted by the corporation E. H. Stanton & Company in the States of Washington, Oregon, Idaho and Montana, for a period of ten years, and for his personal guarantee of the collection of the book accounts and accounts receivable of said corporation, and for his promise to assist Armour & Company in and about the business of said corporation for a period of six months or a year. While the written contract states a lump sum, to wit, $576,400 for the stock [109] and for the agreement of Stanton not to engage in the meat business and the other business mentioned in said four states for the period of ten years, and for his personal guarantee of the collection of said book accounts and accounts receivable, you have the right, if the evidence justifies it, to find that a part of that total consideration, to wit, $576,400, was for the purchase price of the stock itself and a part of that consideration was for Stanton's agreement to guarantee said accounts and for Stanton's agreement not to engage in said meat and other business as above stated. An agreement on the part of Stanton to guarantee said book accounts and not to engage in

said business in said states for the time named would be a valid and enforceable agreement. If you should find from the evidence that of the consideration named in said written contract, to wit, $576,400, $92,266.66 thereof was paid or agreed to be paid to the defendant Stanton for his agreement to guarantee said book accounts and not to engage in said business in said states for the period named, then you must find as a fact that Stanton sold his own stock and the stock of the members of his family for the same price at which the plaintiff's stock was sold, and that the plaintiff cannot recover in this action even though you should find under the evidence that the defendant did in fact sell the plaintiff's stock. If you should find from the evidence that the true consideration for the defendant Stanton agreeing to guarantee these book accounts and not to engage in the meat and other business in said four states for the period of ten years was the sum of $92,266.66, either with or without the automobile referred to in the testimony, it is not material how that amount of $92,266.66 was arrived at. The plaintiff in that event could not recover from the defendant even though that amount was arrived at by taking the total number of shares owned by Stanton and his family and the number of shares owned by the plaintiff Hample and the plaintiff Hamilton, and [110] multiplying the same by $20. Under the circumstances stated the method of arriving at the result of $92,266.66 on the part of the agents of Armour & Company and the defendant Stanton, or either of them, is wholly immaterial.

INSTRUCTION No. IV.

If you should find from the evidence that before Armour & Company paid any money or delivered any notes to the plaintiff, the plaintiff learned in substance of the contract made between the defend-ant and Armour & Company, and did not attempt in any manner to recede from the contract which the plaintiff had signed with Armour & Company, which contract is in evidence, but went on and performed the same by depositing his stock in the bank, as provided in said contract and accepted the moneys and notes as paid by Armour & Company, then the plaintiff cannot recover in this action even though you should find in favor of the plaintiff on the other issues as stated above.

INSTRUCTION No. V.

If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him with Armour & Company, but that Armour & Company failed to deposit the moneys and notes in the same bank as provided in said contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from said bank, notified Armour & Company that he repudiated said contract and would not live up to the same, claiming that he had been induced to enter into said contract through misrepresentation or fraud, and thereafter plaintiff entered into another contract with Armour & Company, whereby he sold the stock in question together with other stock in the same company, and that said Armour & Company paid him therefor, part in money

and part in promissory notes, then you must find for the defendant in [111] this action, even though as to the other issues stated above you should find that the evidence is in favor of the plaintiff.

INSTRUCTION No. VI.

There is in evidence a paper writing dated May 8, 1917, addressed to Fred. B. Grinnell, and signed by the defendant, and the same is Exhibit No. 2. This paper writing has been referred to as an option. No consideration therefor is recited therein, and there was apparently no money consideration given therefor. I instruct you that the defendant had a right to rescind the so-called option and to withdraw therefrom at any time, and the paper writing was not binding upon him except if Mr. Grinnell found a purchaser ready, willing and able to buy, he would be entitled to his commissions as stated therein, whether the sale was actually made or not.

INSTRUCTION No. VII.

Some evidence was introduced upon the cross-examination of the defendant Stanton in relation to the appraisement and purchase of the Armstrong stock. Before the evidence on that subject was completed and before the witness Stanton had testified fully in relation thereto, the Court ordered all of the evidence in relation to that matter stricken from the record. I therefore charge you that you shall disregard said evidence and shall not permit same, or any part thereof, to influence your minds in any manner in arriving at a verdict in this case. [112]

Thereupon the case was argued by the respective

attorneys and thereafter the Court instructed the jury as follows:

GENTLEMEN OF THE JURY: The case of Hamilton vs. Stanton and the case of Hample vs. the same defendant have been consolidated for the purpose of this trial, but you will, nevertheless, be required to return two separate verdicts. The two cases are identical with one exception to be hereafter noted so that the charge I am now about to give you in the Hample case will be applicable to the Hamilton case with the exception to which I will later direct your attention.

After alleging certain *jurisdiction* facts and the incorporation of E. H. Stanton & Company, the complaint alleges in substance that on the 8th day of May, 1917, the plaintiff was the owner of 1096⅓ shares of the capital stock of the E. H. Stanton Company; that prior to that date the plaintiff had at the special instance and request of the defendant assisted the defendant in financing the corporation and that their relations then and at all times prior to the last-mentioned date had become and were close and confidential; that the plaintiff had assisted the defendand to his benefit in a financial way in placing the corporation on a sound financial basis; that during all that period the defendant was the president and general manager of the corporation; that prior to the month of May, 1917, the defendant requested the plaintiff to hold his stock consisting of the above number of shares, and to refrain from placing the same upon the market or selling the same until such time as the defendant should [113] sell his stock in the

corporation; and in consideration of the withholding of his stock by the plaintiff from the market the defendant represented and promised the plaintiff that he would advise the plaintiff of any opportunity to sell their stock together, and that the defendant would, without other consideration than the benefit accruing to him therefor, act as the agent of the plaintiff in placing the plaintiff's stock with any purchaser to whom the defendant might desire to sell his stock, and would secure for the plaintiff the best price possible, and the same price at which he, the defendant, might be able to sell his stock; that in consideration of these representations and promises the plaintiff agreed to and did hold his stock and did depend upon the defendant to place his stock at the same price as the defendant should secure for his own stock in the event of a sale; that during the month of May, 1917, without the knowledge or consent of the plaintiff, the defendant contracted to sell his stock and also the plaintiff's stock to Armour & Co., a corporation; and that the price stipulated in the contract of sale was $220 per share; that after the making of this contract between the defendant and Armour & Co., defendant represented to the plaintiff that he had an opportunity to sell the plaintiff's stock, together with his own, to Armour & Co., but falsely and fraudulently represented to the plaintiff that the price the defendant was to receive therefor was $200 per share; that the defendant contracted to sell to Armour & Co. 5084⅓ shares of the capital stock of the corporation at a price of $220 per share and that that amount or number of shares included the

plaintiff's stock; that without revealing to plaintiff the fact of this contract with Armour & Co. or the fact that any such contract had been entered into and by falsely and fraudulently stating to the plaintiff that the price at which the defendant's stock was to be sold and at which the plaintiff's stock was to be [114] sold was the sum of $200 per share, the defendant induced the plaintiff to sell his stock to Armour & Co., as he supposed, for the sum of $200 per share, when in truth and in fact the sale was made by the defendant to the said Armour & Co. at $220 per share and that the defendant took and received as the proceeds of said sale of plaintiff's stock the sum of $20 per share in excess of the amount paid to plaintiff or accounted for to him by the defendant; that the plaintiff delivered his stock to Armour & Co., or to the defendant for Armour & Co., and received therefor payment at the rate of $200 per share and no more; that the plaintiff at all times relied upon the defendant and upon his contract with the defendant to place and sell his stock at the same price which the defendant received for his and that by reason of the false and fraudulent statements and representation of the defendant to the plaintiff the plaintiff was defrauded out of the sum of $20 per share, which said sum defendant received and retained unlawfully and fraudulently to the plaintiff's damage in the sum of $21,926.67; that plaintiff did not know the true facts concerning such transaction until after the contract between defendant and Armour & Co. had been executed and did not learn the true facts concerning the same until long there-

after, and upon the discovery of such facts and of the fraud so perpetrated upon him the plaintiff demanded of the defendant that defendant pay over to him the balance of the purchase price, to wit, the sum of $21,926.67, which said demand was by defendant refused.

The answer admits the jurisdictional facts and the ownership of the stock by the plaintiff, the selling of the stock to Armour & Co., but denies substantially each and every other allegation in the complaint.

I will state at the outset that the burden is upon the plaintiff to make out his case and to prove every essential fact material to a recovery by a fair preponderance of the testimony. [115] By "preponderance of the testimony" is simply meant the greater weight of the testimony or the testimony which is the more creditable and convincing to your minds.

If you find in this case from a preponderance of the testimony that the defendant assumed and agreed to and did actually conduct the negotiations which resulted in the sale of the stock from the plaintiff to Armour & Co., that the plaintiff had no information concerning the price which Armour & Co. was willing to pay or the price which the defendant was to get for his stock, *accept* such as defendant gave him, that by reason of the misstatement of concealment of any material fact or facts by defendant the plaintiff was induced to accept $200 a share for his stock, whereupon $20 on the number of shares owned by him was added to the price paid to the defendant for his stock without the plaintiff's knowledge or consent, and that this $20 a share was added to the

price paid defendant because Armour & Co. had been able to procure plaintiff's stock for $200 a share, *that* I charge you that the amount of money thus received, to wit, $20 a share, on the number of shares owned by plaintiff rightfully belongs to the plaintiff and that the defendant in equity and good conscience cannot retain it, and that your verdict should be for the plaintiff in that amount, together with interest thereon from the time of its receipt by the defendant at the rate of 5% per annum.

On the other hand, I charge you that if the plaintiff conducted the negotiations for the sale of his stock on his own responsibility without advising or consulting with the defendant, and fixed upon his own selling price, there can be no recovery in this action, even though the defendant may have received a greater price for his own stock, unless you find from a preponderance of the testimony that a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him. In the latter event [116] the plaintiff is still entitled to the right to recover regardless of the question of agency.

The theory of the plaintiff's case as stated in the complaint is this: That the plaintiff authorized the defendant to sell his stock at the same price that defendant would sell his own stock and that the defendant falsely and fraudulently represented to the plaintiff that the selling price was $200 per share, and that in reliance thereon the plaintiff agreed to sell the stock to Armour & Co. for the sum of $200 per share, whereas the sale was in fact made by the de-

fendant and that the defendant received from Armour & Co. upon the sale of the plaintiff's stock the sum of $220 per share.

In order for the plaintiff to recover on this theory he must therefore establish by a preponderance of the evidence the following propositions:

1. That the plaintiff authorized the defendant to sell his stock and the defendant agreed to sell the same at the same price as he received for his own.

2. That the defendant did in fact sell the plaintiff's stock or induce the plaintiff to sell the same.

3. That the price which Armour & Co. agreed to pay for the plaintiff's stock was $220 per share and not $200 per share.

4. That Armour & Co. have actually paid or agreed to pay for the plaintiff's stock the sum of $220 per share, paying or agreeing to pay $20 thereof to the defendant.

If the plaintiff has failed to establish by the preponderance of the evidence any of these propositions, the plaintiff cannot recover upon that theory. If, however, you find from the preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was in fact paid or agreed to be paid to the defendant by Armour & Co., the plaintiff has a right of action for the sum thus paid or agreed to be paid to the defendant [117] is still retained by him.

The defendant contends, on the other hand, that he did not sell the plaintiff's stock, but that the plaintiff sold his own stock and that the plaintiff fixed the price thereon at the sum of $200 per share.

If the jury find from the evidence that the stock of the plaintiff was sold by the plaintiff on his own responsibility and not by the defendant, the plaintiff cannot recover in this action, and your verdict must be for the defendant, unless, as already stated, you find from the preponderance of the testimony that a part of the consideration for the sale of the plaintiff's stock was actually paid to or agreed to be paid to the defendant and was actually received and is still retained by him.

The defendant further contends that he sold the stock owned by himself and other members of his family, amounting to 2420⅓ shares, at $200 per share and that the amount in excess thereof as set forth in the written contract, $92,266.66 and a certain automobile, were paid to the defendant in consideration of his agreement not to engage in the meat business or any other business then conducted by the corporation of E. H. Stanton & Company in the states of Washington, Oregon, Idaho and Montana for a period of ten years, and for his personal guarantee of the collection of the book accounts and the accounts receivable of the corporation and for his promise to assist Armour & Co. in and about the business of the corporation for a period of six months or a year.

While the written contract states a lump value of the consideration of $576,400 for the stock and for the agreement of Stanton not to engage in the meat business and the other business mentioned in the said four states for the period of ten years, and for his personal guarantee of the collection of the book accounts and the accounts receivable, you have the

right, if the evidence warrants it, to find that a part of that total consideration of $576,400 was for the purchase price of the stock itself and part of [118] that consideration was for the definite agreement to guarantee the accounts and for his agreement not to engage in the meat and other businesses as already stated.

An agreement on the part of Stanton to guarantee the book accounts and not to engage in business in the said states for the period stated is a valid and enforceable agreement. If you should find from the evidence that of the consideration named in the written contract, to wit, $576,400, $92,266.67 thereof was paid or agreed to be paid to the defendant Stanton for his agreement to guarantee the book accounts and not to engage in business in the states and for the period aforesaid, then you must find as a fact that Stanton sold his own stock and the stock of the members of his family for the same price at which the plaintiff's stock was sold, and that the plaintiff cannot recover in this action, even though you should further find under the evidence that the defendant did in fact sell the plaintiff's stock.

If you should find from the evidence that the consideration for the defendant Stanton agreeing to guarantee the book accounts and not to engage in the meat and other business in such four states for a period of ten years was the sum of $92,266.66 either with or without the automobile referred to in the testimony, it is not material how that amount of $92,-266.66 was arrived at. The plaintiff in that event could not recover from the defendant, even though

that amount was arrived at by taking the total number of shares owned by the defendant and his family and the number of shares owned by the plaintiff Hample and the plaintiff Hamilton and multiplying the same by $20. Under the circumstances stated, the method of arriving at the result of $92,266.66 on the part of the agents of Armour & Company and the defendant Stanton, or either of them, is wholly immaterial except in so far as it may throw light upon the actual agreement between the parties. [119]

Of course, gentlemen of the jury, you will be controlled by the actual facts and actual agreement entered into by the parties and not by the mere form which these agreements may assume on paper. If you find in truth and in fact that the agreement between the parties was as above stated, there can be no recovery in this action; but if, on the other hand, you find that the foregoing agreement was a mere subterfuge to cover up or conceal the fact that a part of the consideration for the sale of the plaintiff's stock was in fact paid to the defendant Stanton, you will disregard the mere form and be governed by the facts as they actually exist. There is in evidence a certain optional agreement dated May 8, 1917, signed by the defendant. There was no consideration received on that agreement and there was apparently no money consideration given therefor. I instruct you, therefore, that the defendant had a right to rescind the so-called option and to withdraw therefrom at any time, and the paper writing was not binding upon him until the other party therein named found a purchaser ready, willing and able to buy. You

will consider this optional agreement, therefore, only in so far as it will enable you to determine what the consideration for the sale of the stock actually was.

I have already stated to you that there is one point of difference between the two cases. There is testimony tending to show that after his return to the State of Montana the plaintiff Hamilton withdrew his stock from the bank and attempted to rescind the contract for its sale entered into in the city of Spokane, as already stated. Upon that issue I charge you as follows:

If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him and Armour & Co., but that Armour & Co. failed to deposit the money and notes in the bank as provided in the contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from the bank and notified Armour & Co. [120] that he repudiated his contract and would not live up to the same, claiming that he had been induced to enter into the contract through misrepresentation and fraud, and thereafter the plaintiff entered into a new and independent contract with Armour & Company for a new consideration whereby he sold the stock in question, together with other stock in the same company, and that Armour & Co. paid him therefor part in money and part in promissory notes, then you must find for the defendant in this action, even though as to the other issues stated above you should find that the evidence is in favor of the plaintiff.

If, however, you find from the preponderance of the testimony that the stock was finally delivered to Armour & Co., pursuant to the contract made and entered into in the city of Spokane and not pursuant to some new and independent contract, the attempt on the part of the plaintiff Hamilton to rescind his contract will not bar a recovery.

You, gentlemen of the jury, are the sole judges of the facts in this case and of the credibility of the witnesses. Before reaching a verdict you will carefully consider and compare all the testimony. You will observe the demeanor of the witnesses upon the stand; their interest in the result of your verdict, if any such interest is disclosed; their knowledge of the facts about which they have testified; their opportunities for hearing, seeing or knowing the facts; the probability of the truth of their testimony, and all the facts and circumstances given in evidence and surrounding the witnesses at the trial.

I further charge you that if you find from the testimony that any witness has willfully testified falsely to a material fact, you are at liberty to disregard the testimony of that witness entirely except in so far as he may be corroborated by other credible testimony or by other known facts in the case. [121]

Some evidence was introduced on the cross-examination of the defendant Stanton in relation to the appraisement and sale of stock belonging to a party named Armstrong. Before the evidence on that subject was completed and before the witness had testified fully in relation thereto, the Court ordered all the evidence in relation to that matter stricken from the

record. I therefore charge you that you must disregard such evidence and you will not permit the same to influence your minds in any manner in arriving at your verdict. I further charge you that testimony was offered here tending to show that the defendant Stanton was convicted of the crime of larceny in the territory of Montana some thirty-odd years ago. You may consider this testimony in so far as it affects the credibility of the witness; but you must not consider it for any other purpose or allow it to influence you in any manner.

EXCEPTIONS.

The following exceptions to the charge of the Court to the jury were taken by the defendant in open court before the jury retired to consider of their verdict, to wit:

I.

Defendant excepts to the ruling of the Court that the burden is upon the plaintiff to prove the material facts alleged in the complaint only by fair preponderance of the evidence instead of by evidence clear and convincing, as shown by the following portion of the charge, to wit:

> "I will state at the outset that the burden is upon the plaintiff to make out his case and to prove every essential fact material to a recovery by a fair preponderance of the testimony." [122]

II.

Defendant excepts to the ruling of the Court that the plaintiff might recover in this action although the defendant did not in fact sell the stock of the

plaintiff, as shown by the following portion of the charge, to wit:

> "If you find in this case from a preponderance of the testimony that the defendant assumed and agreed to and did actually conduct the negotiations which resulted in the sale of the stock from the plaintiff to Armour & Co.; that the plaintiff had no information concerning the price which Armour & Co. was willing to pay or the price which defendant was to get for his stock except such as the defendant gave him; that by reason of the misstatement or concealment of any material fact or facts by the defendant, plaintiff was induced to accept $200 a share for his stock whereupon $20 on the number of shares owned by him was added to the price paid to defendant for his stock without plaintiff's knowledge or consent, and that this $20 per share was added to the price paid defendant because Armour & Co. had been able to procure plaintiff's stock for $200 per share, then I charge you that the amount of money thus received, to wit, $20 a share, on the number of shares owned by plaintiff rightfully belongs to the plaintiff and that the defendant in equity and good conscience cannot retain it, and that your verdict should be for the plaintiff in that amount, together with interest thereon from the time of its receipt by the defendant at the rate of 5% per annum."

III.

Defendant excepts to the ruling of the Court that the plaintiff might recover in this action if he

was induced to sell his stock for $200 per share by reason of the misstatement or concealment of any material fact or facts by the defendant, as shown in that portion of the charge last quoted.

IV.

Defendant excepts to the ruling of the Court that the plaintiff might recover in this action from the defendant if the plaintiff was induced to sell his stock at $200 per share by reason of the misstatement or concealment of any material fact or facts by defendant and such misstatement or concealment is shown by a preponderance of the testimony rather than by evidence clear and convincing, as shown by that portion of the charge last quoted. [123]

V.

Defendant excepts to the ruling of the Court that, although the defendant did not sell plaintiff's stock, but the plaintiff sold his own stock, if the defendant was paid a higher price on account of the sale of his own stock because the plaintiff sold his stock for only $200 per share, that the plaintiff may recover in this action, as shown by that portion of the charge last quoted.

VI.

Defendant excepts to the ruling of the Court that knowledge or lack of knowledge of the plaintiff as to the price which defendant was to get for his own stock was a material fact to be taken into consideration by them, as shown in that portion of the charge last quoted.

VII.

Defendant excepts to the ruling of the Court that,

as shown in the charge above quoted, the plaintiff might recover the full amount sued for, to wit, $21,-926.66, and that the defendant "in equity and good conscience" cannot retain any part thereof, although the defendant had paid or agreed to pay a 2% commission to a broker for bringing about such sale and the defendant had been required by Armour & Co. in order to bring about sale to guarantee the book accounts of the E. H. Stanton Company and had actually paid on that account the sum of $22,534.00.

VIII.

Defendant excepts to the ruling of the Court that, although the plaintiff sold his own stock on his own responsibility he may recover in this action if he advised or consulted with the defendant in relation thereto, as shown by the following portion of the charge, to wit:

> "On the other hand, I charge you that if the plaintiff conducted the negotiations for the sale of his stock on his own responsibility without advising or consulting with the defendant and fixed his own selling price, there can be no recovery in this action, even though the defendant may have [124] received a greater price for his own stock, unless you find from a preponderance of the testimony that a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him. In the latter event, the plaintiff is still entitled to the right to recover regardless of the question of agency."

IX.

Defendant excepts to the ruling of the Court that, if there was paid to the defendant any moneys whatsoever on account of the sale of the plaintiff's stock, the plaintiff may recover, although the defendant was neither agent nor trustee for the plaintiff, and the plaintiff conducted the negotiations for the sale of his stock on his own responsibility and fixed his own selling price therefor, as shown by that portion of the charge last quoted.

X.

Defendant excepts to the ruling of the Court to the effect that, although the defendant was neither agent nor trustee for the plaintiff and did not sell plaintiff's stock, but plaintiff sold his own stock on his own responsibility, if defendant received any moneys on account of such sale that he must account for the whole thereof to plaintiff, although he may have paid or contracted to pay 2% of the selling price of said stock to a broker and may have paid $22,534 on account of his contract with Armour & Co. to guarantee the book accounts of the corporation, which contract Armour & Co. made a condition precedent to the purchase of any stock in said corporation.

XI.

Defendant excepts to the ruling of the Court that, although the plaintiff conducted the negotiations for the sale of his stock on his own responsibility without consulting the defendant and fixed his own selling price therefor and received the $200 per share so fixed by the plaintiff, that nevertheless the plaintiff may recover in this action if Armour & Co. allowed

the defendant $20 for each of the shares owned by the plaintiff on account [125] of the agreement of the defendant not to engage in any manner in the four northwestern states for the period of ten years in the meat business or any other business conducted by E. H. Stanton Company or on account of commissions to Fred B. Grinnell on any other account, as shown by that portion of the charge last quoted.

XII.

Defendant excepts to the charge of the Court as set forth in the two quotations made above as inconsistent with the ruling and charge of the Court as stated in the following portion of the charge, to wit:

> "The theory of the plaintiff's case as stated in the complaint is this: That the plaintiff authorized defendant to sell his stock at the same price that defendant would sell his own stock, and that the defendant falsely and fraudulently represented to the plaintiff that the selling price was $200 per share and that in reliance thereon plaintiff agreed to sell his stock to Armour & Co. for the sum of $200 per share, whereas the sale was in fact made by the defendant, and that the defendant received from Armour & Co. upon the sale of plaintiff's stock the sum of $20 per share.

XIII.

Defendant excepts to the ruling of the Court that the plaintiff might recover upon some other theory than that stated in the complaint as quoted above, as shown by the following portion of the charge which follows that quoted above, to wit:

"In order for the plaintiff to recover *on this theory,* he must therefore establish by a preponderance of the evidence the following propositions: (1) That the plaintiff authorized defendant to sell his stock and the *plaintiff authorized defendant to sell his stock and the* defendant agreed to sell the same at the same price that he received for his own; (2) that the defendant did in fact sell plaintiff's stock or induce plaintiff to sell the same; (3) that the price which Armour & Co. agreed to pay for plaintiff's stock was $220 per share and not $200 per share; (4) that Armour & Co. have actually paid or agreed to pay for plaintiff's stock the sum of $220 per share, paying or agreeing to pay $20 thereof to the defendant."

This charge is also inconsistent with those portions of the charge quoted in Exceptions Nos. 2 and 8. [126]

XIV.

Defendant excepts to the ruling of the Court that plaintiff may recover in this action, although the defendant did not sell the plaintiff's stock, provided the defendant induced the plaintiff to sell his stock for $200 per share, as shown in the charge last quoted.

XV.

Defendant excepts to the ruling of the Court that, although the plaintiff has not established by a preponderance of the evidence the theory of his case, as outlined in the complaint, he may nevertheless recover in this action upon another and inconsistent theory, as shown by the following portion of the charge which

was given immediately following that portion last above quoted, to wit:

> "If the plaintiff has failed to establish by a preponderance of the evidence any of these propositions, the plaintiff cannot recover on that theory. If, however, you find from a preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was in fact paid or agreed to be paid to the defendant by Armour & Co., the plaintiff has a right of action for the sum thus paid or agreed to be paid to the defendant if still retained by him."

XVI.

Defendant excepts to the ruling of the Court that, although none of the following propositions are established by the evidence, to wit: "(1) that the plaintiff authorized defendant to sell his stock and that the defendant agreed to sell the same at the same price he had received for his own; (2) that the defendant did in fact sell plaintiff's stock or induce plaintiff to sell the same; (3) that the price which Armour & Co. agreed to pay for plaintiff's stock was $220 per share and not $200 per share; (4) that Armour & Co. have actually paid or agreed to pay for plaintiff's stock the sum of $220 per share, paying or agreeing to pay $20 thereof to the defendant,"—that nevertheless plaintiff may recover in this action if any moneys were paid or [127] agreed to be paid to the defendant on account of plaintiff's stock, as shown in that part of the charge last quoted.

XVII.

Defendant excepts to the failure of the Court to de-

fine what is meant by the expression "if still retained by him" in that part of the charge last quoted.

XVIII.

Defendant excepts to the ruling of the Court that if Armour & Co. paid to the plaintiff by way of commission or bonus or any other account any moneys on account of the sale of the plaintiff's stock, although the plaintiff sold his own stock upon his own responsibility, that the plaintiff may recover in this action, as shown by the following portion of the charge, to wit:

> "If the jury finds from the evidence that the stock of the plaintiff was sold by the plaintiff on his own responsibility and not by the defendant, the plaintiff cannot recover in this action and your verdict must be for the defendant unless, as already stated, you find from a preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was actually paid to or agreed to be paid to the defendant and was actually received and is still retained by him."

XIX.

Defendant excepts to the ruling of the Court that moneys paid or agreed to be paid by the defendant to the broker Grinnell under the optional agreement in evidence and moneys paid on account of the guaranty of the book accounts made by the defendant and required by Armour & Co. to be made by him, are not to be considered as moneys not retained by the defendant, as shown by that portion of the charge last quoted and by the other quoted portions of the charge, and that plaintiff may recover as though such pay-

ments had not been made or that defendant was not liable therefor.

XX.

Defendant excepts to the ruling of the Court that the plaintiff may recover upon either of two inconsistent theories, [128] one being that outlined in the complaint, to wit: that defendant sold the stock of the plaintiff and received a part of the consideration therefor; that the selling price was $220 per share; and that the plaintiff got $200 per share thereof while the defendant got $20 per share thereof. The other theory not outlined in the complaint is that the plaintiff sold his own stock, fixed the price therefor himself upon his own responsibility, such price being $200 per share, but that if Armour & Co. allowed the defendant on any account the sum of $20 per share for the number of shares owned by the plaintiff, that the plaintiff may recover in this action, all of which is shown by the quotations already made from the charge.

XXI.

Defendant excepts to the ruling of the Court that, although the plaintiff repudiated the contract made by him dated May 21, 1917, upon the ground that he had entered into it through fraud and misrepresentation and withdrew from the bank his stock theretofore deposited by him and thereafter made a new and independent contract with Armour & Co. whereby he sold the stock in question, together with other stock in the same company acquired by him after May 21, 1917, and Armour & Company paid him therefor, that is, for both quantities of stock, that nevertheless

plaintiff may recover in this action unless the second contract had "a new consideration" therefor, as shown by the following portion of the charge, to wit:

> "If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him and Armour & Co., but that Armour & Co. failed to deposit the money and notes in the bank as provided in the contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from the bank and notified Armour & Co. that he repudiated his contract and would not live up to the same, claiming that he had been induced to enter into the contract through misrepresentation and fraud and thereafter plaintiff entered into a new and independent contract with Armour & Co. for a new consideration whereby he sold the stock in question, together with other stock in the same Company, and that Armour & Co. paid him therefor part in money and part in promissory notes, then you must find [129] for the defendant in this action, even though as to the other issues stated above you should find that the evidence is in favor of the plaintiff. If, however, you find from a preponderance of the testimony that the stock was finally delivered to Armour & Co. pursuant to the contract made and entered into in the City of Spokane, and not pursuant to some new and independent contract, the attempt on the part of the plaintiff Hamilton to rescind his contract will not bar a recovery."

XXII.

Defendant excepts to the ruling of the Court that, although the plaintiff withdrew his stock from the bank, as stated above, and notified Armour & Co. that he repudiated the same because he had been induced to enter into the same through fraud and misrepresentation and, although the plaintiff had after May 21, 1917, purchased from another stockholder 773⅓ shares at $190 per share and did in the latter part of June, 1917, make a deal with Armour & Co. whereby he sold said 773⅓ shares at $220 per share and his original 1096⅓ shares at $200 per share, getting for the latter stock the same price which he would have gotten had he lived up to his contract of May 21, 1917, that the plaintiff may still recover in this action, as shown in that portion of the charge last quoted.

XXIII.

Defendant excepts to the modification made in the charge as requested by the defendant in Instruction No. 1, said modification being shown in that part of the charge quoted in exception Nos. 12 and 13. Said instruction No. 1 is as follows, to wit:

> "The theory of plaintiff's case as set out in the complaint is that the plaintiff authorized the defendant, E. H. Stanton, to sell his stock, and that E. H. Stanton agreed with the plaintiff to sell plaintiff's stock at the same price he sold his own stock and that the defendant falsely and fraudulently represented to plaintiff that the selling price was $200 per share, and that in reliance thereon the plaintiff agreed to sell his stock to Armour & Company for $200 per share, but that

the sale was in fact made by the defendant, and that the defendant received from Armour & Company upon the sale of plaintiff's stock the sum of $20 per share for said stock. [130]

In order for the plaintiff to recover he must establish by a preponderance of the evidence the following things:—

(a) That the plaintiff authorized the defendant to sell plaintiff's stock and the defendant agreed to sell plaintiff's stock at the same price he sold his own stock.

(b) That defendant did in fact sell plaintiff's stock.

(c) That the price which Armour & Company promised to pay for plaintiff's stock was $220 per share, and not $200 per share.

(d) That Armour & Company have actually paid for plaintiff's stock the sum of $220 per share, paying $20 thereof to the defendant.

If the plaintiff has failed to establish by a preponderance of the evidence any of said matters, the plaintiff cannot recover herein."

XXIV.

Defendant excepts to the ruling of the Court that, although the plaintiff knew, before Armour & Co. had paid the plaintiff any money or delivered any notes, of the terms of the contract made between the defendant and Armour & Co. and thereafter the plaintiff did not attempt in any manner to recede from his contract which he had made with Armour & Co., but went on and performed the same in accordance with the terms, and that such acts on the part of plaintiff

are not material and do not affect his right to recover herein, and that he may recover notwithstanding the same, as shown by the refusal of the Court to give Instruction No. 4 requested by the defendant, which is as follows, to wit:

> "If you should find from the evidence that before Armour & Company actually paid any money or delivered any notes to the plaintiff, the plaintiff learned in substance of the contract made between the defendant and Armour & Company, and did not attempt in any manner to recede from the contract which the plaintiff had signed with Armour & Company, which contract is in evidence, but went on and performed the same by depositing his stock in the vank, as provided in said contract and accepted the moneys and notes as paid by Armour & Company, then the plaintiff cannot recover in this action even though you should find in favor of the plaintiff on the other issues as stated above."

XXV.

Defendant excepts to the ruling of the Court against giving instruction No. 5 requested by the defendant and to the [131] modifications in such instruction as given by the Court, which modifications are shown in exception No. 21. Said instruction No. 5 is as follows, to wit:

> "If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him with Armour & Company, but that Armour & Company failed to deposit the moneys and notes in the same bank

as provided in said contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from said bank, notified Armour & Company that he repudiated said contract and would not live up to the same, claiming that he had been induced to enter into said contract through misrepresentation or fraud and thereafter plaintiff entered into another contract with Armour & Company whereby he sold the stock in question together with other stock in the same company, and that said Armour & Company paid him therefor, part in money and part in its promissory notes, then you must find for the defendant in this action, even though as to other issues stated above you should find that the evidence is in favor of the plaintiff."

Thereupon the jury retired to consider the evidence and returned a verdict for the plaintiff and against the defendant in the sum of $25,109.06. [132]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Order Settling Bill of Exceptions.

I, FRANK H. RUDKIN, Judge of the above court

and the Judge who presided in said court on the trial of the foregoing cause, do hereby certify that the matters and proceedings set out in the foregoing bill of exceptions are matters and proceedings occurring in this cause and not already a part of the record therein, and that the bill of exceptions was filed within the time allowed by law as extended by order of the Court, and said bill of exceptions is made a part of the record herein. I further certify that after amendments were proposed by plaintiff to said bill of exceptions, a hearing was had thereon and all the amendments proposed by plaintiff have been incorporated in said bill of exceptions except where by agreement of the parties the same were modified.

I further certify that said bill of exceptions conforms to the truth and contains all the matters and facts material in the proceedings heretofore occurring in the cause and not already a part of the record therein and necessary for the review of this cause by the Circuit Court of Appeals, and the said foregoing bill of exceptions with the amendments proposed by plaintiff incorporated therein, so far as allowed, is hereby settled, allowed and certified as the true bill of exceptions in this cause.

Done in open court this 31st day of July, 1920.

FRANK H. RUDKIN,
District Judge. [133]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

E. H. STANTON,

Plaintiff in Error,

vs.

J. L. HAMILTON,

Defendant in Error.

Praecipe for Transcript of Record.

To W. H. Hare, Clerk of United States District Court:

You will please prepare and certify the record to be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, the said record to include the following:

Complaint, amended answer, verdict of the jury, judgment, order extending time for serving bill of exceptions, petition for writ of error, assignments of error, order allowing writ of error, writ of error, bond on writ of error, citation and return, bill of exceptions, order settling bill of exceptions.

DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff in Error.

Filed in the U. S. District Court, Eastern District of Washington. June 21, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [134]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Order Extending Time to and Including August 21, 1920, to Prepare Record.

Now, on this day, it is ORDERED by the Court, that the clerk of this court may have until August 21, 1920, to prepare and forward the record upon appeal, in the above-entitled cause.

Done this 7th day of July, A. D. 1920.

FRANK H. RUDKIN,
Judge. [135]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States in and for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages constitute and are a full, true, correct and complete copy of so much of the record, pleadings, orders and other proceedings had in said

action, as the same remains of record and on file in the office of the clerk of the said court, as called for by the defendant and plaintiff in error in his praecipe; and that the same constitute the record on writ of error from the judgment of the District Court of the United States in and for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, which writ of error was filed in my office on June 19, 1920.

I further certify that I herewith transmit the original writ of error and the original citation issued in this cause.

I further certify that the fees of the clerk of this court for preparing and certifying to the foregoing typewritten record amounts to the sum of Fifty-five and 85/100 (55.85) Dollars, and that the same has been paid in full by Danson, Williams & Danson, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 10th day of August, A. D. 1920.

[Seal] W. H. HARE,
Clerk. [136]

[Endorsed]: No. 3538. United States Circuit Court of Appeals for the Ninth Circuit. E. H. Stanton, Plaintiff in Error, vs. J. L. Hamilton, Defendant in Error. Transcript of Record. Upon Writ of

Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed August 13, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Writ of Error (Original).

The President of the United States to the Honorable Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment on a plea which, in the said District Court before you or some of you, between E. H. Stanton, plaintiff in error (defendant in the lower court) and J. L. Hamilton, defendant in error (plaintiff in the lower court), a manifest error hath happened to the great damage of said E. H. Stanton, plaintiff in error, as by his complaint appears,—

We being willing that error, if any hath happened, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ, in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings, aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of June, in the year of our Lord one thousand nine hundred twenty.

[Seal] W. H. HARE,

Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

Allowed by:

FRANK H. RUDKIN,
District Judge.

[Endorsed]: No. 3261. In the District Court of the United States for Eastern District of Washington. J. L. Hamilton, Plaintiff, vs. E. H, Stanton, Defendant. Writ of Error. Filed in the U. S. District

Court, Eastern Dist. of Washington. Jun. 19, 1920. Wm. *M.* Hare, Clerk. H. J. Dunham, Deputy.

No. 3538. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 13, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

RETURN ON SERVICE OF WRIT.

United States of America,
Eastern District of Washington,—ss.

I hereby certify and return that I served the annexed Citation, on the therein named A. B. Lee, by handing to and leaving a true and correct copy thereof with him personally at Spokane, in said District, on the 21st day of June, A. D. 1920.

J. E. McGOVERN,
U. S. Marshal.
By J. W. Dennison,
Deputy.

Serving writ: $2.00.
Mileage ..... .06

$2.06.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

E. H. STANTON,
Plaintiff in Error,

vs.

J. L. HAMILTON,
Defendant in Error.

Citation on Writ of Error (Original).

The President of the United States to J. L. Hamilton, and to Messrs. Lee & Kimball and Graves, Kizer & Graves, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ pursuant to a writ of error regularly issued and which is on file in the office of the clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said court, wherein E. H. Stanton is plaintiff in error (defendant in the lower court) and J. L. Hamilton is defendant in error (plaintiff in the lower court), and to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 21 day of June, 1920.

FRANK H. RUDKIN,
United States District Judge.

[Seal] Attest: W. H. HARE,
Clerk of Said Court.

[Endorsed]: No. 3261. In the District Court of the United States for Eastern District of Washington. J. L. Hamilton, Plaintiff, vs. E. H. Stanton, Defendant. Citation and Return. Filed in the U. S. District Court, Eastern Dist. of Washington. Jun. 21, 1920. Wm. H. Hare, Clerk. H. J. Dunham, Deputy.

No. 3538. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 13, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Notice of Substitution of Attorneys.

To the Above-named Plaintiff, and to Messrs, Lee & Kimball and Graves, Kizer & Graves, Your Attorneys:

The undersigned, attorneys of record for the defendant, hereby substitute as attorneys for defendant R. J. Danson, Jas. A. Williams and Robert W. Danson, partners as Danson, Williams & Danson, of Spokane, Washington, and you are notified that the undersigned are no longer connected with said case.

Dated this 14th day of May, 1920.

DON F. KIZER,
POST, RUSSELL & HIGGINS.

To the Plaintiff and Your Attorneys Above Named:

You are notified that R. J. Danson, Jas. A. Williams and Robert W. Danson, partners as Danson, Williams & Danson, have been substituted as my at-

torneys in the above action and you will recognize them as such.

Dated this 14th day of May, 1920.

E. H. STANTON.

[Endorsed]: No. 3538. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 19, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. H. STANTON, Plaintiff in Error,
vs.
J. L. HAMILTON, Defendant in Error.

No. 3538.

On Writ of Error to the United States District Court, Eastern District of Washington, Northern Division.

Plaintiff in Error's Opening Brief.

JAS. A. WILLIAMS,
DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff in Error.

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SEP 27 1908
F.D. MONCKTON

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. H. STANTON, Plaintiff in Error, vs. J. L. HAMILTON, Defendant in Error.	No. 3538.

On Writ of Error to the United States District Court, Eastern District of Washington, Northern Division.

Plaintiff in Error's Opening Brief.

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STATEMENT.

This is a companion case, with the one where J. E. Hample is Defendant in Error. The cases, while not consolidated, were tried together, and with one exception the facts in each case are identical. In each case, on trial before the District Court and a jury, Defendants in Error recovered judgment in the sum of $25,109.06 against Plaintiff in Error, from which the writs of error are prosecuted to this court.

E. H. Stanton & Co. was a meat packing corporation located at Spokane; its capital stock consisted of 6,000 shares of the par value of $100 each. Of this stock, Plaintiff in Error and his family owned 2420 2/3 shares. Defendant in Error owned 1093 1/3 shares, and J. E. Hample, the Defendant in Error in the other case before this court, likewise owned 1093 1/3 shares. The remainder of the stock was scattered. Plaintiff in Error resided at Spokane and had, since the organization of the corporation been its president, and in practical control of the business. (Trans. 52, 102.) Defendant in Error and said J. E. Hample resided at Butte, Montana, and once or twice a year would visit the plant, and about the first of each year would receive a statement as to the condition of the business. (Trans. 51, 69.)

On May 8, 1917, Plaintiff in Error gave to Fred B. Grinnell Co., brokers engaged in selling on commission, an option to purchase 5084 1/3 shares of the stock in E. H. Stanton Co. at the price of $220 a share, cash, such option to be exercised within 15 days, and in such agreement agreed to pay a commission of two per cent "for selling stock of E. H. Stanton Co." (Trans. 40.) Within the 15 days mentioned, said Fred B. Grinnell Co. interested Armour & Co., Chicago meat packers, and within said time, Armour & Co. contracted to purchase the stock of Plaintiff in Error and his family, Defendant in Error and said Hample, paying part cash, and the remainder in notes maturing on various dates. The purchase of this stock by Armour & Co. was made through three separate writings, one signed by the Defendant in Error, one signed by said Hample, and one signed by Plaintiff in Error. The contracts with Defendant in Error and Hample were made prior to the contract with Plaintiff in Error. (Trans. 83-84, 90, 106, 116.) The consideration paid Defendant in Error and Hample for their stock, as provided by their written agreements signed by themselves, was $200 a share. (Trans. 48-49, 58.) The written agreement for the purchase of Plaintiff in Error's stock recited a total consideration of $576,400, this amount being paid, part in cash and part in notes. This purchase price paid, or to be paid, Plaintiff in Error amounted to $92,-266.67 in excess of $200 a share for the stock so

sold by Plaitiff in Error and his family, and this lawsuit and the one instituted by Hample arises out of the fact that there was such excess of $92,-266.67. While the contracts made by Armour & Co. with Defendant in Error and said Hample dealt only with the purchase of their stock, yet the contract made by Armour & Co. with Plaintiff in Error dealt with other subjects, and the purchase price of $576,400 was paid, not only in consideration of the 2420 2/3 shares of stock acquired, but as consideration for three additional agreements. These additional agreements were as follows:

> "In consideration of the purchase price paid him by second party, first party agrees that for a period of ten years from date hereof, said first party will not engage in Montana, Oregon, Idaho or Washington, either as owner, manager, employee or stockholder in a like or similar business to that now carried on by the E. H. Stanton Co., a corporation.
>
> "The first party guarantees the payment to second party of all accounts receivable of the E. H. Stanton Co. as they appeared on January, 1917, and those accrued, less the amount collected by second party on accounts which have been heretofore been charged off to profit and loss; that is to say, if the losses on the accounts receivable exceed the amounts collected or accounts which have been previously been charged off to profit and loss, first party will pay the difference to second party." (Trans. 38.)

In addition to the said two added agreements, it was orally agreed between Plaintiff in Error and Armour & Co. that for the said consideration so

paid of $576,400, Plaintiff in Error would for a period, not to exceed one year, render such assistance in the management of the business as Armour & Co. should require. (Trans. 79, 87, 105.)

The amounts of the accounts receivable of E. H. Stanton & Co. so guaranteed by Plaintiff in Error aggregated $350,000 (Trans. 79 and 107), and up to the time of the trial of the cases, Plaintiff in Error had been compelled to pay on account of this guarantee $22,534. (Trans. 94 and 107.)

It was testified by Plaintiff in Error, Mr. O'Hern, one of the representatives of Armour & Co., who closed the deal, and by Mr. Robbins, the other representative of Armour & Co., that the purchase price of all of this stock of Plaintiff in Error, Defendant in Error and said Hample was but $200 a share (Trans. 105, 106); that Armour & Co. was not willing to purchase the stock of E. H. Stanton & Co., unless it could obtain the agreement of Plaintiff in Error to retire from the meat packing business in the aforesaid states mentioned, and the Plaintiff in Error's guarantee the accounts receivable and his assistance in the business (Trans. 78, 85, 101, 106), that Plaintiff in Error, while willing to sell the stock of himself and family for $200 a share (Trans. 84, 106), demanded as consideration for his agreement to retire from the meat packing business, the guarantee of the book accounts and for the assistance which he should render in the business for a period not to exceed one year, $100,

000; that Armour & Co. was unwilling to pay this amount, but finally agreed that it would pay therefor an amount which would be the equivalent of $20 a share on the stock purchased from Plaintiff in Error, Defendant in Error and Hample (Trans. 93, 96, 106-107, 117); that the reason this method was adopted in making the figures was that when these representatives of Armour & Co. came to Spokane, the Company was advised that the stock could be purchased for $220 a share; that the representatives on the ground finally were willing to pay that price provided they could get with the stock, the agreement of Plaintiff in Error to withdraw from the meat packing business, guarantee of the accounts receivable and his agreement to assist in the business, but were unwilling to buy, unless it could get these additional agreements. (Trans. 79, 101.) That due to this situation, these representatives of Armour & Co. felt that it would be necessary for them to keep the entire amount paid for the stock, including these additional agreements on the part of Plaintiff in Error, within the figure of $220 a share (Trans. 86, 100); that when the representatives of Armour & Co. finally made the proposition to pay this amount of $92,266.67 in consideration of Plaintiff in Error retiring from the meat packing business, his guarantee of the accounts receivable and his agreement to assist in the business, Plaintiff in Error refused to accept the said proposition, but after some argument, the deal was

closed on that basis with the addition that Plaintiff in Error was given a certain automobile and Armour & Co. agreed to buy other stock which might be procured by Defendant in Error within a certain time (Trans. 107, 117).

Defendant in Error in his complaint in this case claims: (1) That Plaintiff in Error was acting as his agent and sold Defendant in Error's stock, as well as his own, at $220 a share; (2) that Plaintiff in Error misrepresented the amount for which the stock could be sold and induced Defendant in Error to act upon such misrepresentation to his damage in the sum of $20 a share (Trans. 2-6). In addition to the issues so presented by the complaints, the trial court submitted the case to the jury on the theory of liability for money had and received. Exception to the instructions given and refused were properly taken (Trans. 139).

SPECIFICATIONS OF ERRORS.

1. The District Court erred in instructing the jury as follows:

> "If you find in this case from a preponderance of the testimony that the defendant assumed and agreed to and did actually conduct the negotiations which resulted in the sale of the stock from the plaintiff to Armour & Co. that the plaintiff had no information concerning the price which Armour & Co. was willing to pay, or the price which the defendant was to get for his stock except such as defendant gave him, that by reason of the misstatement or concealment of any material fact or facts by

defendant the plaintiff was induced to accept $200 a share for his stock, whereupon $20 on the number of shares owned by him was added to the price paid to the defendant for his stock without the plaintiff's knowledge or consent, and that this $20 a share was added to the price paid defendant because Armour & Co. had been able to procure plaintiff's stock for $200 a share, that I charge you that the amount of money thus received, to-wit, $20 a share, on the number of shares owned by plaintiff rightfully belongs to the plaintiff and that the defendant in equity and good conscience cannot retain it, and that your verdict should be for the plaintiff in that amount, together with interest thereon from the time of its receipt by the defendant at the rate of 5% per annum." (Trans. 131-132.)

2. The District Court erred in giving the jury the following instructions, and particularly that portion which, for convenience, we have italicized, to-wit:

"On the other hand, I charge you that if the plaintiff conducted the negotiations for the sale of his stock on his own responsibility without advising or consulting with the defendant, and fixed upon his own selling price, there can be no recovery in this action, even though the defendant may have received a greater price for his own stock, *unless you find from a preponderance of the testimony that a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him. In the latter event the plaintiff is still entitled to the right to recover regardless of the question of agency.*" (Trans. 132.)

3. The District Court erred in giving the jury the following instructions, and especially that portion which, for convenience, we have italicized, to-wit:

> "The theory of the plaintiff's case as stated in the complaint is this: That the plaintiff authorized the defendant to sell his stock at the same price that defendant would sell his own stock and that the defendant falsely and fraudulently represented to the plaintiff that the selling price was $200 per share, and that in reliance thereon the plaintiff agreed to sell the stock to Armour & Co. for the sum of $200 per share, whereas the sale was in fact made by the defendant and that the defendant received from Armour & Co., upon the sale of the plaintiff's stock the sum of $220 per share.
>
> In order for the plaintiff to recover on this theory he must therefore establish by a preponderance of the evidence the following propositions:
>
> 1. That the plaintiff authorized the defendant to sell his stock and the defendant agreed to sell the same at the same price as he received for his own.
>
> 2. That the defendant did in fact sell the plaintiff's stock or induce the plaintiff to sell the same.
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> 3. That the price which Armour & Co. agreed to pay for the plaintiff's stock was $220 per share and not $200 per share.
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> 4. That Armour & Co. have actually paid or agreed to pay for the plaintiff's stock the sum of $220 per share, paying or agreeing to pay $20 thereof to the defendant.
>
> If the plaintiff has failed to establish by the

preponderance of the evidence any of these propositions plaintiff cannot recover upon that theory. *If, however, you find from the preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was in fact paid or agreed to be paid to the defendant by Armour & Co., the plaintiff has a right of action for the sum thus paid or agreed to be paid to the defendant if still retained by him.*" (Trans. 132-133.)

4. The District Court erred in giving the jury the following instructions, and especially that portion which we have, for convenience, italicized, to-wit:

"If the jury find from the evidence that the stock of the plaintiff was sold by the plaintiff on his own responsibility and not by the defendant, the plaintiff cannot recover in this action and your verdict must be for the defendant, *unless, as already stated, you find from the preponderance of the testimony that a part of the consideration for the sale of the plaintiff's stock was actually paid to or agreed to be paid to the defendant and was actually received and is still retained by him.*" (Trans. 134.)

5. The District Court erred in giving the jury the following instruction, and especially that portion which we have, for convenience, italicized, to-wit:

"If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him and Armour & Co., but that Armour & Co. failed to deposit the money and notes in the bank as provided in the contract on or before the day named therein, and that thereafter the plain-

tiff withdrew his stock so deposited from the bank and notified Armour & Co. that he repudiated his contract and would not live up to the same, claiming that he had been induced to enter into the contract through misrepresentation and fraud, and thereafter the plaintiff entered into *a new and independent contract with Armour & Company for a new consideration* whereby he sold the stock in question, together with other stock in the same company, and that Armour & Co. paid him therefor part in money and part in promissory notes, then you must find for the defendant in this action, even though as to the other issues stated above you should find that the evidence is in favor of the plaintiff.

"If, however, you find from the preponderance of the testimony that the stock was finally delivered to Armour & Co., pursuant to the contract made and entered into in the city of Spokane and not pursuant to some new and independent contract, the attempt on the part of the plaintiff Hamilton to rescind his contract will not bar a recovery." (Trans. 137-138.)

6. The District Court erred in entering judgment on the verdict in favor of Defendant in Error and against Plaintiff in Error. (Trans. 16.)

ARGUMENT.

I.

Specification of Error 1.

This instruction was erroneous for two reasons: (1) There was no evidence to support the same, and even if it should be held that the instruction correctly stated the law, the giving of such abstract instruction was misleading and confusing and inconsistent with other instructions to the prejudice of Plaintiff in Error; (2) If there was evidence sufficient to justify such an instruction, it was erroneous as fixing the amount of Defendant in Error's recovery at $20 a share.

1. The whole foundation for this instruction is the claim that the stock of Plaintiff in Error, and Defendant in Error, was purchased by Armour & Co. at $220 a share. In fact there is no foundation for, or theory of, recovery, unless the purchase price exceeded $200 a share. The alleged misrepresentation relate solely to this point as likewise does any claim of violation of agency. It cannot be questioned that Defendant in Error received but $200 a share and that he did not understand he was to receive more. There certainly is no direct evidence that any amount was paid for any of the stock of Plaintiff in Error, in excess of $200 a share, and if it can be said that there is anything in the record which would permit a jury to find that the purchase price was in excess of that amount, it must

be by way of justifiable inference. Keeping this thought in mind, we will consider the evidence in the case in detail.

The contracts made by Defendant in Error and Hample, signed by themselves, fixes the price of their stock at $200 a share. (Trans. 48, 58.) The written contract of Plaintiff in Error fixes no price for his stock, but does fix a lump sum of $576,400 which Armour & Co. were to pay for: (1) 2420 2/3 shares of stock; (2) Plaintiff in Error's agreement to withdraw from the packing business in the four states mentioned; (3) Plaintiff in Error's guarantee of the accounts receivable; (4) Plaintiff in Error's oral agreement to assist in the business for a period not to exceed one year. (Trans. 38, 89, 105, 116.) The contract, by its terms, does not attempt to segregate this consideration and apply the same to the different agreements passing from Plaintiff in Error to Armour & Co. It could be, with nearly as much reason, urged that the entire consideration was paid for the last three agreements, as that the said sum was only in consideration of the transfer of the stock. That the withdrawal of Plaintiff in Error from the packing business in the four states mentioned was a very valuable consideration, cannot be doubted; nor can it be doubted that the guarantee of the accounts receivable aggregating approximately $350,000 was a very valuable consideration. Not only was there a parting by Plaintiff in Error with very valuable considera-

tions, but these conditions were highly valuable to Armour & Co. The same is true, but to a lesser extent, with reference to the assistance to be rendered by Plaintiff in Error in the business for not to exceed one year. We will discuss these features more at length later, but suggest at this place that if the judgment of the lower court is sustained, it would be on the theory that Plaintiff in Error had given these valuable considerations, without return being made to him therefor, and Defendant in Error is to be made a beneficiary of these property rights. In other words, these added considerations passing from Plaintiff in Error to Armour & Co. have been used to swell the purchase price of the stock of Defendant in Error, a most unreasonable and unjust result.

The witness, O'Hern, with the witness, Robbins, were the representatives of Armour & Co. who had charge on behalf of that Company in making the contracts. The material portions of Mr. O'Hern's testimony bearing on this point is as follows:

> "Mr. Hample and Mr. Hamilton came to me one evening in the hotel and said they understood I was there to purchase the stock * * *. There seemed to be some feeling between them and Mr. Stanton * * *. They said they did not give anybody any authority to sell their stock, and if the stock was sold they were going to sell it themselves * * *. They started asking a price—I think, although I am not certain about it, somewhere around $250 a share, and I told them that we could not consider any-

thing like that, that I was told by Mr. Robbins he had an option on that stock to buy it at $220 a share and they said they had given no authority to anybody to sell that stock at $220 a share." (Trans. 76 and 77.)

"They came back a day or so before the deal was finally closed and said to me they were willing to sell their stock at $200 a share provided Stanton got no more for his stock than they got for theirs; and I advised them that there was some features in connection with this deal that I wanted cleared up. Mr. Robbins had indicated in a conversation that I had with him that he was not going to buy this stock without some guarantee that the book accounts—that was usual in buying stock—that those book accounts be guaranteed. There was book accounts amounting to over $350,000 there, that we wanted some guarantee on them and asked them if they were willing to guarantee it. They said no, absolutely they would not. I told them we also wanted that Mr. Stanton would not go into business in the immediate vicinity for a limited period of time, and if they would guarantee that he would not do it. They said they would have nothing to do with that; wouldn't do that. We told them we wanted Mr. Stanton's service for a period of three to six months, possibly constantly, and for at least a year in an advisory capacity, or subject to our call if we needed it. I asked them how they felt about that, and they said they would not assume any responsibility for that." (Trans. 78 and 79.)

"Mr. Stanton was holding off for what I thought was excessive prices for the features we were asking for, such as the guarantee of the book accounts and the other features. He finally agreed that in the event the deal was

made he would assume all responsibility for the book accounts. He would stay with us subject to call for a year and stay two or three months longer on the plant every day we desired." (Trans. 81.)

"The Witness: Yes. When that was concluded, I remember a remark that Mr. Stanton made. He said, "Now you fellows get out of here. I've got to make my deal."

Q. Mr. Kizer: That is, he said that to Hample and Hamilton?

A. To Mr. Hample and Hamilton. Everybody laughed and shook hands and they went out.

Q. Then did you make your deal with Mr. Stanton after they went out?

A. Yes, sir.

Q. At the time they went out, had there been a definite price agreed upon with Stanton for his stock and for the other considerations that he was giving?

A. There had been no definite price agreed upon. There was a trade being made upon it. We were apparently close together.

Q. At that time what was he hanging out for?

A. He was hanging out for a round sum. He had mentioned $100,000. He had mentioned some other consideration.

Q. The question I was asking, Mr. O'Hern, was he holding out for this $100,000 in addition to the set price for this stock?

A. At this time I can't say whether—, yes, in addition to stock, but I can't say at this time whether that was in addtiion to $200 or $220 a share for his stock. He knew what these other men were getting, and I had impressed

on him at that time, before he came into the conference, that there was no use agreeing to deal unless he could go within the figures that Mr. Robbins had mentioned to me, which was that he would not go beyond the option price—the aggregate option price for this stock.

Q. Then I take it that after Mr. Hample and Mr. Hamilton went out of the room you proceeded to dicker for his stock?

A. Yes, sir.

Q. Just detail the course of those negotiations.

A. Well, the same features incidental to a contract were then discussed in a preliminary way with Mr. Stanton, particularly with reference to his staying with us in business, staying with us or being subject to call for a certain period of time, and for the use of his services during that time. With reference to the book accounts, the guaranteeing of them, he made a little objection to that, but Mr. Robbins pointed out to him that we knew nothing about the customers or his trade at all, and that we would insist on that; that there was too much on the books there for the small concern it was to think of taking a business -over without knowing more about them, and they would not assume that responsibility. That was finally agreed upon. (Trans. 84 and 85.)

There was considerable trading, and they finally wound up and the figures agreed upon in there (indicating contract). (Trans. 86.)

A. $576,400. Mr. Stanton was asking for more, but Mr. Robbins said it would be ridiculous to consider, that it would put him in a very ridiculous position to go back home and tell those people that he paid a larger price than the option originally called for." (Trans. 86.)

Upon CROSS EXAMINATION, Mr. O'Hern testified as follows:

"We put in the additional agreement that we were to pay Mr. Stanton $220 for more stock if he could get it because Mr. Stanton was demanding more than we were willing to pay. I told Mr. Hample and Mr. Hamilton that Mr. Stanton wouldn't sell his stock without somebody taking care of his commission and asked them if they were going to and they said no, that they had nothing to do with that; that Mr. Stanton could not sell their stock; that if they traded they would trade direct and that Stanton had no right to give an option. * * *.

Q. No, I am asking about you, not about Mr. Robbins now.

A. All right; absolutely not. I had met them all a week ahead of that. (Trans. 87 and 88.)

Q. Now do you mean to tell us that you went on and closed up your contract with Hamilton and Hample without knowing whether you were going to be able to close with Stanton and what the terms with Stanton would be?

A. Yes and no. Mr. Stanton and myself had come to an understanding. We were not very far apart. Mr. Stanton's last word to me was 'You know what I want and I know what you are willing to give. Now we will be able to fix this up if these other fellows want to sell their stock.'

Q. At that time you knew you were willing to pay and were going to agree with Stanton to pay $220 a share for all stock that he could get hold of no matter what it cost him?

A. When and what time?

Q. At the time you told that to Hamilton and Hample.

A. I don't know that.

Q. What?

A. I don't know that. We told him that he —I am not certain whether that was agreed to before or after.

Q. How long after you signed your contract with them did you sign up with Stanton?

A. About two or three hours; the meeting was continuous. I think we went out to lunch in the interval, or something like that, while the attorneys were drawing up the papers. (Trans. 89 and 90.)

Mr. Robbins had told me on Saturday that under no consideration would he agree to buy these shares where in the aggregate they would amount to more than $220 a share, or the option, and for that reason he judged it was useless to figure with Stanton on any other trade.

Q. For above $220?

A. Yes.

Q. Well, but you did though—now why?

A. I don't quite see that we did.

Q. Well, you agreed to pay him $576,400 for 2420 2/3 shares; that is what your contract reads. I am talking of what your contract reads, which according to the figures you just made for me amounts to $238 and a fraction, and I expect that we took that 2/3 shares, which would amount to $239 and a fraction.

A. The exact result of the negotiations with him is not clear in my mind as to how that was arrived at.

Q. All you know is what the contract shows?

A. I know that Mr. Robbins had in his mind what I told you.

Q. Did you figure what his good will was

worth, his agreement not to enter into competition with you in the states mentioned in this contract?

A. You can not put figures on good will.

Q. I say did you?

A. We recognized it as an asset.

Q. Did you get any figure on the amount of it?

A. Oh, no. I don't think any two men can agree on what the value of good will is.

We did not put any figures on Stanton's services, although they had in mind what they would pay a manager; did not put any figures on the guarantee of the accounts, which amounted to about $350,000; that he had been informed at the office that Stanton had paid $5,000 in one item and $18,000 in another; and had taken over the accaunts.

He was to give all his time to Armour & Co. for three months and be subject to call six months or a year." (Trans. 93 and 94.)

MR. ROBBINS, the other representative of Armour & Co., testified as follows:

DIRECT EXAMINATION:

"After that contract was signed, Mr. Stanton said to them" (Hample and Hamilton) "in effect that if they would leave he would proceed to make his contract with us." (Trans. 100.)

Upon CROSS EXAMINATION he testified:

"My maximum of what I wanted to pay on this stock as a whole was $220 a share. While the option itself had elapsed in my opinion, I

knew the people at home had that figure fixed in their mind and I thought I would have to let the trade drop rather than have paid any more than that for the stock.

"I found that Mr. Stanton was not willing to take $220 for his stock. He had refused to do so in view of the guarantee and the limitations which we required to be a part of the trade. When I was told by Mr. O'Hern that Hample and Hamilton would probably take $200 for their stock, I could see a chance to trade, increasing the payments to be made to Mr. Stanton.

"When Mr. Hample and Mr. Hamilton came to my room that morning I said, 'I am informed by Mr. O'Hern that you are willing to take $200 for your stock.' One of them said 'Yes, sir.' I turned to the other gentleman and asked the same question. He said 'Yes, sir.' Well, I said, I guess there isn't any occasion to prolong this meeting. We will send for an attorney and let him draw up an agreement to that effect.

"Mr. Stanton wanted $100,000 more or less for the other things and I explained to him that I would not under any circumstances pay over the average of $220 for the stock. If Hamilton and Hample had demanded $220 for their stock from me, there would have been no trade. The thing would have ended there and there would have been no trade and we would have gone home. If I got the stock of these two men I could have gotten a control of the stock without Mr. Stanton." (Trans. 100 and 101.)

MR. KIZER, the attorney who drew the agreements of sale and who was present at the time of

the final negotiations for the stock of both Plaintiff in Error and Defendant in Error, testified:

"After talking a few minutes Mr. Stanton said, 'You fellows go on down stairs, I want to make my deal now.' They both laughed and prepared to leave and one of them said jokingly, 'Get as much money out of Armour as you can, he can afford it.'

"Mr. Robbins then told Mr. Stanton that he thought his price of $100,000 for staying out of business, guaranteeing the book accounts and assisting Armour & Co. in the management of the plant, was out of the question. That they had come west with an option to buy the stock at $220 a share and that if they paid Mr. Stanton this amount it would make the aggregate more than the amount of the option and that he didn't have the nerve to report back to the Chicago office after doing such a thing.

"Mr. Stanton said, 'You have offered me $200 for my stock and I will take $200 just as I agreed, but now you are speaking of something else and that is a horse of a different color. If you want it you will have to pay for it.' There was considerable argument and conversation. Mr. Stanton insisted that he would either sell his stock for $200 a share or he would sell for $200 and for $100,000 additional would stay out of business and guarantee these bills.

"Mr. Robbins suggested that they would rather risk buying the other outstanding stock and keeping Mr. Stanton with them than doing that because he was acquainted with the trade and they didn't care to have him for a competitor.

"Mr. Stanton finally suggested that if they calculated the difference between $200 and $220 per share upon all the stock it would amount to close to $100,000. We all figured up on that basis and it came to $92,266.66 and Mr. Robbins said, 'Mr. Stanton, that is just as high as we dare go.' But Mr. Stanton still said that wasn't enough. Then one of them, either Mr. Robbins or Mr. O'Hern, suggested that they would throw in the Packard car which had been talked about and Mr. Stanton said that would only make $94,000 or $95,000. There was a great deal of argument after that and trading back and forth and finally Mr. Robbins offered to agree to buy from Mr. Stanton all of the stock which he could pick up and pay him $220 per share for it, and Mr. Stanton finally consented to that. I then outlined to them a contract figured upon the basis of the stock at $200 a share and $92,000 odd dollars for these other things. Mr. Robbins said it would be best not to put it in that way; that Armour & Co. were always accused of being a trust and always trying to drive their competitors out of business and they didn't like to show any money consideration for that agreement and asked if it couldn't all be lumped in at that sum. (Trans. 116, 117 and 118.)

The above, we think, fairly shows the condition of the evidence in the case dealing with the question, except the testimony given by Plaintiff in Error. We have not quoted all of the testimony of O'Hern dealing with the question, but have quoted sufficient to show the nature of this evidence.

Plaintiff in Error testified that he was 59 years of age, had been in the meat packing business 35

to 40 years, that E. H. Stanton Co. was organized in 1904 for $150,000; that during the life of the corporation he was its sole manager, would go to the plant at 5 o'clock in the morning and leave at 6 or 7 o'clock in the evening, and would work part of the day on Sundays, and that he drew a salary of $300 a month. (Trans. 101-102.) That after the question of a deal with Armour & Co. was brought to his attention, he went to Butte, Montana, to interview Defendant in Error and Hample concerning the matter and while he was returning by train he received a telegram from Defendant in Error and Hample which read "Positively do not sell our stock. We will attend to that ourselves." And when he reached Spokane, he received another telegram from them saying "Positively do not sell our stock. Jim and I will leave for Spokane tonight." (Trans. 101 and 103.) On Sunday morning (the day before the sales were made) Plaintiff in Error had a further talk with O'Hern.

> 'I met him accordingly, and we talked the matter over quite fully. He said they had concluded to take our stock at $200 a share, but that they wanted me to agree to stay out of the meat packing business in this part of the country, and to guarantee the book accounts and also to remain and assist them at the plant for a time. That didn't sound very good to me, and finally he said they might consider giving me a small consideration for that, and I told him I would let them know the next morning.
>
> "Monday morning, Mr. O'Hern came out to

the plant between 7 and 8 o'clock and I told him I would do what they wanted for $100,000 in excess of what they wanted to pay for the stock. Mr. O'Hern said that he was sure that Mr. Robbins would not consider such a proposition for a minute, but that he would go back and see what he would say about it. He went back to town, and at about 11:30 that forenoon, called me over the phone and asked me to come down to the hotel at about 2 o'clock. Hamilton and Hample were out to the plant at that time, and I told them I thought Armour & Co. were figuring on closing up with us and that they wanted us to come in, and so we all went down and met Mr. O'Hern in the lobby. We went up to Mr. Robbins' room and Mr. Robbins said that O'Hern had told him that Mr. Hample and Mr. Hamilton had agreed to take $200 a share for their stock, and they said that they had, and he said he guessed that was all there was to it. We called up Mr. Kizer and he came over and got the terms of the contract and went back to his office and drew it up.

"After the contract was signed, I said, 'Now you fellows go on down town. I will try and make my deal.' And as they were going out they said jokingly, 'These folks have a lot of money, make as good a deal as you can.'

"After they had gone out Mr. Robbins told me that they could not consider paying me $100,000 in addition to paying for the stock, since that would run the purchase price considerably over the option which I had given them, and that Mr. Armour would think they were mighty poor traders.

"I told them that I was willing to live up to my agreement to sell my stock for $200 a share but he that they could not afford to buy my stock and then have me go into the

meat business again. Finally Mr. O'Hern suggested that we figure the price of the stock at $220 a share and upon counting it up that came to a little over $92,000 and I told them that was not enough, so they offered to throw in the little Packard automobile, which I figured made a total of about $95,000, and I stated to them that $100,000 was my price. Then one of them suggested that they would give me four or five months to pick up the balance of the stock and would pay me $220 a share for it. I concluded that was about as good as I could do and about all I could get so I accepted that. (Trans. 105, 106 and 107.)

"At the time of the trade the book accounts amounted to about $350,000 and up to date I have paid Armour & Company $22,534.00 on bad accounts and in addition defended a lawsuit upon one of them. I actually stayed out at the plant about two months and rendered services in an advisory capacity up to about a week or ten days ago." (Trans. 107.)

Defendant in Error offered no evidence whatsoever as to the price that was paid by Armour & Co. for the stock in question, except to introduce in evidence the written contracts made by Armour & Co. for the purchase of the stock to which we have above referred, and to introduce in evidence a portion of the cross examination of Plaintiff in Error given on the trial of another case where Plaintiff in Error was defending a lawsuit in which the agent, Fred B. Grinnell Co., was claiming an additional commission for making the sale, over that which was paid by Plaintiff in Error. Outside of introducing this cross examination in evi-

dence, there is no other evidence in the case except as Defendant in Error has attempted to weaken the effect of the testimony of these witnesses through cross examination. We have set out above so much of this cross examination as we think is necessary, and do not believe that the testimony of the witnesses has been shaken in the least. However, if it could be reasonably claimed that their evidence was shaken, it has not gone to the point where there is anything in the record to establish affirmatively the necessary element, to-wit: that the purchase price of the stock was $220 a share, and the burden of proving this was on Defendant in Error. The said cross examination of Plaintiff in Error given on the trial of the commission suit, to which we above referred, and which was introduced in evidence in this case, eliminating therefrom what we consider to be redundant to this case, is as follows:

> "MR. GRAVES: What do you mean by 92,000 odd? I want to get him somewhere where he will say. What were you to get over and above the $200 a share?
>
> A. I was to get twenty cents a share on all the stock that had been sold at that time.
>
> THE COURT: $20.00 you mean?
>
> A. Twenty dollars on all the stock that had been sold at that time, and it amounted to ninety-two thousand some odd dollars and that wasn't enough. Then I told them I would take the automobile in and even then it was not enough and then Mr. O'Hern made the proposition that he would give me $2.20 a share for

all the stock I would turn over to him in four months; and I closed the deal on those lines.

Q. You were to get $20 a share commission on all the stock which had been bought at that time?

A. Yes, sir.

Q. That included first Hample and Hamilton's stock?

A. Yes, sir.

Q. And second, it included yours and your family's stock?

A. It wasn't a commission.

Q. We won't call it anything. You were to get $20 a share on it?

A. That was the way we figured it.

Q. That meant now, reduced to figures, that you were to get $20 a share on Hample's stock, didn't it?

A. Not on Hample's stock, no, sir.

Q. Didn't include that?

A. No, sir, I had nothing to do with Hample's stock or Hamilton's.

Q. What stock had been sold at that time that you were to get $20 a share on?

A. On the stock that was sold—Mr. O'Hern —Mr. Robinson said it never would do to let that $100,000 or whatever it amounted to, get into Chicago that way. And that was the way he put it in. It was easier to let it go on the option that way.

Q. Let me see if I understand that. The only stock that he bought at that time was your stock and Hample's and Hamilton's, was it?

A. Yes, sir.

Q. Hample had 1096 and a fraction and Hamilton had 1096 and a fraction?

A. Yes, sir.

Q. And you had 2,420 and a fraction?

A. Yes, sir.

Q. That is all they bought at that time?

A. Yes, sir.

Q. Didn't you just say you were to get $20 a share on all the stock they bought at that time?

A. I explained that transaction to you right as we were in that Davenport Hotel, start to finish.

Q. To me?

A. Yes, right there.

Q. Well now, I am not asking you—I am a funny fellow about that, I like to get at it piecemeal. You were to get $20 a share on all stock that they had bought up to that time?

A. Yes, sir.

Q. Now they hadn't bought any stock up to that time, had they, except you three men's?

A. Yes, that is all.

Q. Now, were you to get $20 a share on these three lots?

A. It figured up that way.

Q. Never mind how it figured up, I asked you were you to get that?

A. Well, I was to get $20 a share on the stock that they had bought from Hample and Hamilton.

Q. And that $20 was in addition to the $200 on what they had bought from you, was it?

A. No, I don't think so.

Q. Well, then, you were not—either you

were or were not. I want to know which and I don't care a cent which it is.

A. Yes, it was on the stock that they had bought. It all figured up that much, yes.

Q. Then you were to get $20 a share on Hamilton's stock and Hample's stock, and Stanton's stock?

A. Yes, sir.

Q. In addition to the $200 on your stock?

A. Yes, sir.

Q. And that figured up to just $576,400?

A. Well, whatever it figures up.

Q. Well, it does figure up to that, don't you know it?

A. All right.

Q. Don't you know it—you know I figured it all up with O'Hern, took me about two hours but I finally got him to it—isn't that a fact, that is what it figures to?

A. The figures are right there.

Q. It figures up to the price stated in the contract, doesn't it? $576,400, doesn't it?

A. Something over $500,000.

Q. Doesn't it figure up to the price stated in this contract between Armours and you, $576,400?

A. Yes, sir, that is it.

Q. So then, instead of fixing a lesser sum of what you were to get for all of this good will, staying out of business, and guaranteeing accounts, and so on, instead of doing that you said, 'Now, you have got to give me $220 for my stock and then you have got to give me $20 a share on Hamilton's and Hample's stock?'

A. No, sir, nothing of that kind ever said.

Q. All right, we will pass that. 'And in

addition you have got to give me four months to speculate on the other fellows who haven't got in yet.'

A. That was their proposition and not mine.

Q. And you took it?

A. Yes, sir." (Trans. 34, 35, 36 and 37.)

From the evidence, to which reference is above made, we think, it appears conclusively not only that there is nothing in this case on which a court or jury could make a finding that in excess of $200 a share was paid by Armour & Co. for the stock, but that it affirmatively appears, without contradiction, that Armour & Co. did not pay in excess of $200 a share. There was no burden on Plaintiff in Error to prove anything with reference to the purchase price of the stock, but the burden was upon Defendant in Error to establish the pivotal fact alleged by him, namely, that Armour & Co. did pay $220 a share.

If it should be argued by the Defendant in Error that the jury had a right to find that Plaintiff in Error and his witnesses testified falsely, we submit that there is nothing in the testimony of any of these witnesses, which casts discredit upon their evidence, nor is there anything unreasonable in that testimony. But even if it could be said that the jury had a right to disregard the testimony of Plaintiff in Error and his witnesses, it would be unavailing to Defendant in Error. As suggested before, the burden of proof on this point was on

Defendant in Error, and, even if the jury was entitled to discredit such evidence, there would be left nothing on which the jury could make an affirmative finding that in excess of $200 a share was paid for the stock.

We apprehend that the real argument of Defendant in Error will be, that, this cross examination of Plaintiff in Error in the commission case, which evidence was introduced on the trial of this case, was sufficient to carry the case to the jury. If this should be the contention of the Defendant in Error, we respectfully submit that such a contention would be unsound. The witness in this cross examination was categorically answering questions propounded by counsel, who was seeking to frame his questions in such a way as to require answers on which a contention could be made, that the answers were inconsistent with Plaintiff in Error's theory. This opposing counsel reminded the witness that he was "a funny fellow" and that he liked "to get at it piecemeal." (Trans. 36.) In other words, counsel was desirous of splitting the answers up into many different parts, when it was necessary to give the whole transaction complete, and sought in this way if possible to create confusion. When this cross examination is read complete it is quite apparent that the witness on his direct examination had told his story in about the language as shown by his testimony in this case, and this cross examination was an effort to break down that story.

There is nothing, however, we submit, in this cross examination and the testimony of the Plaintiff in Error and his witnesses in this case, when properly analyzed, which supports the judgment. It first appears in this cross examination that Plaintiff in Error was being asked concerning this $92,266.67, since counsel was referring to "92,000 odd dollars." (Trans. 34.) That Plaintiff in Error was claiming on this examination that he, Hamilton and Hample had been paid but $200 a share for their stock, appears from the question of counsel where he says "* * * What were you to get over and above the $200 a share?" (Trans. 34.) That there was a controversy with Armour & Co. as to the amount that should be paid Plaintiff in Error for the agreements which were under discussion appears where the witness says "$20 on all the stock that had been sold at that time, and it amounted to 92,000 some odd dollars and that wasn't enough * * *." (Trans. 34.) That this extra payment had nothing to do with either Hamilton or Hample further appears as follows:

> "Q. That meant now, reducing to figures, that you were to get $20 a share on Hample's stock, didn't it?
>
> A. Not on Hample's stock. No, sir.
>
> Q. Didn't it include that?
>
> A. No, sir. I had nothing to do with Hample's stock or Hamilton's." (Trans. 35.)

That the controversy was over the demand of the Plaintiff in Error for $100,000, as testified to in

this case, appears when the witness says 'On the stock that was sold—Mr. O'Hern, Mr. Robbins said, I think 'It never would do to let that $100,000 or whatever it amounted to get into Chicago that way,' and that was the way he put it. It was easier to let it go on the option that way." (Trans. 35.) That counsel thoroughly understood Plaintiff in Error's contention appears:

> "Q. So then, instead of fixing the lesser sum of what you were to get for all of this good will, staying out of business, guaranteeing of the accounts and so on, instead of doing that you said 'Now you have got to give me $220 for my stock and then you have got to give me $20 a share on Hample's and Hamilton's stock.'
>
> A. No, sir. Nothing of that kind ever said." (Trans. 37.)

The last above question clearly shows that counsel understood the witness as intending to say that this sum of $92,266.67 was paid him for this "good will, staying out of business, and guaranteeing accounts, and so on." The witness had never said, nor is there a word in the testimony to the effect that either Plaintiff in Error, Defendant in Error or Hample were paid a penny in excess of $200 a share for their stock. There has never been any other contention, or claim, on the part of Plaintiff in Error than that this $92,266.67 was the consideration paid for staying out of business, guaranteeing accounts and for his agreement to assist in the business.

The sum total of the contention of Defendant in Error when analyzed is this: That Plaintiff in Error had voluntarily and gratuitously given to Armour & Co. three things of great value: (1) agreement to withdraw from the meat packing business, (2) guarantee of the book accounts, (3) agreement to assist in the business. That these three valuable agreements, which were personal to Plaintiff in Error, were given without consideration and for the purpose of swelling the value of the stock of Defendant in Error and Hample; that Plaintiff in Error was a tricky and unscrupulous person, and during the entire negotiation for the sale of this stock, had designs to overreach and defraud Defendant in Error and Hample and to rob them, and to profit where he was not entitled to profit. At the same time when it is claimed Plaintiff in Error was actuated by these base motives, he was without any occasion therefor, out of bigness of heart and pure generosity giving away without consideration his right to again enter the meat packing business, was guaranteeing accounts amounting to nearly four times what he claims was the purchase price of these additional agreements and promising to give his time in the business. Such a contention must on the mere face of the statement be branded as false.

That the agreement of Plaintiff in Error to retire from the meat packing business in the four states mentioned was a very valuable consideration, we think, cannot be questioned. It was the only

business in which Plaintiff in Error was qualified to engage and he was still in his prime. E. H. Stanton Co. was named after him, and since he had been practically in complete control of the corporation from its organization, it was, no doubt, largely known as his business. He knew the customers, he knew the trade and was in a position to have quickly built up a large and profitable competitive business. The corporation, through his management, had made great profits. Not only was Plaintiff in Error surrendering something of great value, but it was a consideration that was of tremendous value to Armour & Co. This court, we think, will take notice of the fact that it would have been nearly suicidal for Armour & Co. to have purchased this stock without such an agreement from Plaintiff in Error. The value of such an agreement, we have no doubt from the standpoint of Armour & Co. was greater than the entire consideration paid of $92,266.67. All the witnesses agree that Armour & Co. absolutely insisted upon this condition and would not have purchased without it. The consideration was entirely personal to Plaintiff in Error, and neither Defendant in Error, Hample nor any of the other stockholders of E. H. Stanton Co. had any right to participate in anything paid therefor. But, probably, Defendant in Error will argue that according to Mr. O'Hern's testimony (Trans. 81) it appears that Plaintiff in Error stated that he wanted to quit the meat pack-

ing business. If we shoud assume for the sake of the argument that this is true, it changes the result not a particle. It is one thing for a business man, such as Plaintiff in Error, to feel that he is ready to retire from business and another thing for him to bind himself to retire. Men very often change their minds on a question of this sort, and especially, such a man as Plaintiff in Error, who was then in the prime of life. But even if this were not true, the result still is the same. The value of the thing is determined not alone by the desirability of such thing from the vendor's point of view, but likewise from the vendee's point of view. Had not Plaintiff in Error made such an agreement, he might have started a competing business the next day. The same value was there to Armour & Co. in making sure that no such thing would occur. Any expressed intentions on the part of Plaintiff in Error to permanently retire from business was not the thing of value to Armour & Co., but it was an agreement which would absolutely prohibit such return and the value of the agreement to Armour & Co. was not reduced, even if Plaintiff in Error had expressed himself as being through with the packing business.

Likewise was the agreement of Plaintiff in Error to guarantee the outstanding accounts receivable, of very great value to Armour & Co., and was the creation of a heavy liability against Plaintiff in Error. Argument would seem to be unnecessary

to prove this assertion, but if a demonstration of this were necessary it is to be found in the uncontradicted evidence that Plaintiff in Error had been required to pay on account of this guarantee a total sum of $22,534. (Trans. 92, 105.) Many men would hesitate to guarantee these accounts, for less than the entire additional considerations paid Plaintiff in Error of $92,266.67. The court will take notice of the fact that with any business concern doing a credit business, there are many accounts that are uncollectable. The accounts receivable of E. H. Stanton Co. were very large when considered in the light of the business it was doing. (Trans. 114.) It is a well known fact that with any business concern doing a credit business, there is quite a percentage of accounts from time to time that must be charged off into profit and loss account. Plaintiff in Error was certain to be called upon to pay on account of his guarantee, and it was only a question of the amount.

While the agreement on the part of Plaintiff in Error to assist in the business is not of the same importance as his agreement to retire from business and the guaranteeing of the accounts, still this was a valuable consideration. The services of Plaintiff in Error were valuable and recognized by Armour & Co. as being valuable, and his services were in fact furnished.

In the light of all of this, if there was any

evidence whatsoever to sustain Defendant's contention that these additional agreements were a gift, that Plaintiff in Error was to receive nothing in return for them—and this must be Defendant in Error's contention—still we say it would be a most astounding situation. Let it be understood, however, that we most urgently insist that there is no evidence in this record that Plaintiff in Error, Defendant in Error or Hample were to, or did, receive a single penny for their stock in excess of $200 a share. Men and especially business men, ordinarily, act with some degree of reason. They do not convey property without some adequate return. They do not convey their individual property for the purpose of conferring the benefits thereof upon others. Men, who are covetous of their neighbor's property, who desire to defraud their fellowmen, do not in the same transaction give away their individual property voluntarily and without price and at the same time endeavor to, by misrepresentation and fraud, obtain a return of the value of such property by stealing from the other. Under any rule of reason the whole contention of Defendant in Error is branded as being unfounded and could not be accepted by any trier of facts, unless supported by overwhelming testimony and even then the mind would balk. However, if we are able to properly understand the record there is no evidence whatever to sustain such contention.

It follows from what we have said above if our position is sound that the record furnished no foundation for the giving of the instruction referred to in Specification of Error One (1), and, even if the instruction was correct as an abstract statement of law, prejudicial error was committed in giving such an instruction where there was no evidence to support the same.

> "*Abstract Instructions Generally.*—As the very purpose of instructions is to aid the jury in arriving at a proper verdict in the case, the jury should be informed in clear, plain and concise terms as to the law which is applicable to the particular case under consideration, and it is improper and erroneous for a court to give instructions to the jury which are not applicable to the case in any of its phases but which are mere abstract statements of the law. This rule holds good although the instructions contain correct statements in this respect, for the jury is not concerned with what the law may be generally, but only with that very small portion of it which must govern the particular matters under consideration. It is then the plain duty of a trial court to refrain from giving abstract instructions of its own motion, or at the request of either party. The principal and very forcible objection to abstract instructions, however correct in themselves, is that they are necessarily misleading, in that they tend to draw the minds of the jurors away from the real facts in the case to something which they assume to exist, but which cannot be found in the record." * * *.
>
> 14 *R. C. L.* 782.

> "*Applicability to Evidence.*—The scope of

an instruction in a particular case is to be determined, not alone by the pleadings therein, but also by the evidence in support of the issues between the parties, and, even though an issue is raised by the pleadings, it is not proper to give an instruction thereon although it may be abstractly correct, where there is no basis for it in the evidence. The principle upon which this rule is founded is that only such an instruction should be given as is based upon the legitimate evidence in the case. The fact that it may be correct as a general principle of law is not material, for it is the duty of the court to confine itself to a statement of such principles of law as are applicable to the evidence received in support of the contentions of the parties, and thus to aid the jury in arriving at a correct determination of the issues involved. If an instruction is not thus based on the evidence it is erroneous in that it introduces before the jury facts not presented thereby, and is well calculated to mislead and induce them to suppose that such a state of facts in the opinion of the court was possible under the evidence. * * *. But while it is error to give a charge not applicable to the case as made by the evidence, it is harmful error only when the complaining party may probably have been prejudiced by the instruction. The courts, however, ordinarily regard the giving of an instruction having no basis or foundation in the evidence in the case in which it is given as prejudicial, unless it is clearly apparent that the jury could not have been misled by it."

14 *R. C. L.* 786, and cases cited.

The instruction so far as it related to the stock having been sold for $220 a share while it was within the issues as made by the complaint, yet it

was not within the case as made by the evidence, and as a result the giving of such instruction was prejudicial. The quotations above from Ruling Case Law are abundantly supported by the adjudicated cases, a very few of which are the following:

The case of *Goodman v. Simonds,* 61 U. S. 343 (15 L. Ed. 934), was brought by the holder of a bill of exchange against the acceptor, the defense being that the bill was accepted and delivered to the original holder without consideration and for special purposes. The trial court charged the jury that if the original holder had no interest in the bill, or its proceeds, nor authority to use it for his own benefit, and the plaintiff knew or should have known such fact, their verdict should be for the defendant. At page 939 of the Law Edition it is said:

> "There is, however, some reason to doubt whether the evidence at the trial furnished any proper basis for the application of the instruction in this case, even supposing the principle announced to be correct as an abstract proposition; and this gives rise to a preliminary question, which will be first considered, whether the instruction ought not to be regarded as objectionable on that account. When a prayer for instruction is presented to the court, and there is no evidence in the case for the consideration of the jury, it ought always to be withheld; and as a general rule, if it is given under such circumstances, it will be error in the court, for the reason that its tendency may be and often is to mislead the jury, by withdrawing their attention from the legitimate points of

> inquiry involved in the issue. All that was shown at the trial, in addition to the description of the bill, was the refusal of the plaintiff to discount it when it was offered for that purpose, his possession and control of it shortly after, as a pledge for temporary loans, and the subsequent transfer of the bill to him as collateral security at the settlement, together with the circumstances of that transaction, and what appeared in the letter of T. S. Goodman & Co., transmitting the bill to St. Louis for sale. Other circumstances are adverted to in the printed argument for the defendant; but as they do not appear to be sustained by the evidence in the case, they are omitted. Nothing transpired when the bill was offered for discount, more than what occurs on similar occasions in the daily transactions among business men. It was offered and declined, and that was the whole transaction, so far as it was disclosed in the evidence. No reasons were assigned by the plaintiff for declining and none were asked for by the holder, who offered the bill."

In *Blackburn v. Crawford's Lessee,* 70 U. S. 175 (18 L. Ed. 186), the question was whether a marriage had been solemnized. The evidence tended to show that if there had been a solemnization of marriage it was at a certain time and place. The trial court submitted the case to the jury in a manner which permitted them to find that a marriage was solemnized at any time. The court at page 194 of the Law Edition says:

> "The three instructions given by the court *sua sponte* were characterized by a common error. They submitted to the jury, as a ques-

> tion to be considered, whether there was not a marriage at a different time and place, and contracted in a different manner from that alleged by the putative wife, Elizabeth Taylor. Her testimony was clear and positive. It was wholly inconsistent with such a proposition. If there were none as alleged by her, clearly there was none at any time. This was the hinge upon which turned the controversy. All the testimony clustered about and related to that inquiry. The jury should have been so instructed, and their deliberations confined accordingly. Lord Hale says, they should be told 'where the main question or the knot of the business lies.' Hale's Hist. Com. Law, 256. The further inquiry did not arise in the case. What was said could hardly fail to mislead and confuse. It permitted them to substitute conjecture for deduction, and opened a field beyond the sphere of the case, where the means of error were abundant."

The case of *Buyken v. Lewis Construction Company,* 51 Wash. 627 (99 Pac. 1007), was in trespass to recover damage for sluicing down and removing earth from a certain lot in Seattle. The defendant admitted the committing of the acts and justified by claiming that such acts were done persuant to a contract with plaintiff. The jury was instructed as follows:

> "If you find from the evidence that there was no such contract as alleged by the defendant in its affirmative defense, which is exhibit No. 2 in the case, but do find from the evidence that the acts performed by the defendant upon the said premises of the plaintiffs were performed with the knowledge and consent of the

> plaintiffs, then I instruct you that the plaintiffs cannot recover for such acts even though in your opinion the plaintiffs have been damaged thereby, unless you find from the evidence that defendant negligently or carelessly performed the acts and by reason of such negligence and careless performance the plaintiffs had been damaged."

The opinion was written by Chief Justice Rudkin, who said:

> "The latter part of this instruction is clearly without the issues presented by the pleadings. The action was prosecuted by the respondents solely on the theory that the acts complained of were committed without their knowledge or consent and against their will, and all their testimony was directed toward establishing the allegations of the complaint and proving the amount of the resultant damages. The testimony on the part of the appellant, on the other hand, was in support of its affirmative defense, and in reduction of the claim for damages. The question of negligence in the prosecution of the work was not an issue in the case under the pleadings, nor was it made an issue at any stage of the trial. There was no claim that any particular act committed by the appellant was negligently or carelessly committed, nor was there any attempt to segregate damages resulting from negligence from damages resulting from other and independent causes. The instruction was therefore erroneous, and calls for a reversal of the judgment unless we are able to say that the error was not prejudicial, and this we cannot do. There was a direct conflict in the testimony, and the right of recovery was questionable at least. The jury may have found that the acts committed by the

appellant were so committed with the knowledge and consent of the respondents, but that damages resulted from the performance of the work in a manner the jury deemed negligent. Under such circumstances, it is incumbent on this court to order a new trial. *Bernhard v. Reeves,* 6 Wash. 424, 33 Pac. 873; *Comegys v. American Lumber Co.,* 8 Wash. 661, 36 Pac. 1087; *Kirby v. Rainier-Grand Hotel Co.,* 28 Wash. 705, 69 Pac. 378."

In *Central Georgia v. Cornwell,* 76 S. E. (Ga.) 387, the court used the following language at page 389:

"The general rule is that instructions given to the jury must be based upon evidence; and it is error for the court to give instructions to the jury that are not warranted by the evidence. 'A charge is objetcionable which states general principles correctly, but which are nevertheless not applicable to the facts as proven. The instructions should always be given in reference to the evidence in the particular case.' *Gorman v. Campbell,* 14 Ga. 137. In delivering the opinion in the case just cited, Judge Lumpkin said (page 142): 'Nothing is more dangerous than to lay down general propositions which, instead of aiding, scarcely ever fail to mislead juries. Courts should apply the principles of law to the facts in evidence in each particular case, stating those facts hypothetically.' A charge may be abstractly correct; but, unless it is authorized by the evidence in the case it is nevertheless erroneous. *Butt v. Maddox,* 7 Ga. 495 (3); *Towns v. Kellett,* 11 Ga. 286 (2), 293. This court has held to the above stated effect in numerous cases. See 7 *Michie's Dig.,* Ga. R. 570, 571."

See also:

Boston & M. R. Co. v. McDuffey, 79 Fed. 934 (942);
Mohrenstcher v. Westervelt, 87 Fed. 157 (163).

If the instruction was within the issues, still Defendant in Error was not entitled to recover from Plaintiff in Error $20 a share on the amount of his stock sold with interest. Certainly this could not be true. If Defendant in Error's contention should be sustained, the entire amount which Plaintiff in Error profited by the transaction was $20 a share, less the agent's commission of two per cent on $220, or such profit would be but $15.60. If it were true that this stock was sold for $220 a share, then Plaintiff in Error was receiving net but $15.60 a share, or if receiving $20 a share, such sum was charged with the payment of its part of the commission. The very foundation of this action is the option given by Plaintiff in Error to Fred B. Grinnell Co. for Armour & Co. on May 8, 1917, the terms of which option were $220 a share for the stock, the agents to receive two per cent commission. In paragraph 5 of the complaint it is alleged:

> "That during the month of May, 1917, without the knowledge or consent of this plaintiff, the defendant contracted to sell his, the defendant's stock and all the plaintiff's stock to Armour & Co., a corporation, and that the price stipulated in said contract of sale for said stock was two hundred twenty dollars ($220) per share. That after the making of

said contract between defendant and said Armour & Co. defendant represented to plaintiff that he had an opportunity to sell plaintiff's stock and his, the defendant's stock, to Armour & Co., but falsely and fraudulently represented to plaintiff that the price defendant was to receive therefor was Two Hundred dollars ($200) per share. That defendant contracted to sell to said Armour & Co., 5084 1/3 shares of the capital stock of said E. H. Stanton Co. to Armour & Co., at said time, at said price of Two Hundred Twenty Dollars ($220) per share, and that said amount or number of shares included plaintiff's said stock." (Trans. 4.)

On the trial of the case, Defendant in Error pursued the same course and for the purpose of attempting to show that Plaintiff in Error sold the stock of Defendant in Error for $220 a share, introduced in evidence the said option so given to Fred B. Grinnell. (Trans. 40-1.) The situation, therefore, is that Plaintiff in Error is seeking to recover alleged rights based on the said option agreement of May 8, 1917, and by the instruction of the court, he has escaped the burden of that agreement. In other words, Defendant in Error has been awarded a judgment for $440 more than under any theory he could claim. The District Court's instruction gave the jury no alternative but to return a verdict in favor of Defendant in Error for $20 a share, if the verdict was returned in his favor in any sum.

But probably, Defendant in Error will say that there is testimony to the effect that Plaintiff in

Error said that he would look after the commission in consideration of the satisfaction of the $25,000 note. (Trans. 50, 54.) While there is some evidence bearing upon this question, yet there is evidence contradicting such claim. (Trans. 107.) Therefore, the District Court should have submitted such conflict of evidence to the jury for decision, and if the jury found that there was no such agreement that Plaintiff in Error would take care of the commission, that then Defendant in Error's recovery should be reduced to the extent of the commission. The jury, however, was given no such privilege, but the instruction was absolute, requiring a verdict of $20 in any amount.

We have said above that there was a conflict of evidence as to whether Plaintiff in Error in consideration of the release of the $25,000 note was to pay any commission due Fred B. Grinnell & Co. However, this conflict in evidence was not of such a nature as to warrant a verdict being returned against Plaintiff in Error in excess of $15.60 a share. Even according to the testimony of Defendant in Error and his witness, this agreement on the part of Plaintiff in Error was contingent upon Defendant in Error's selling his stock for $200 a share. It had nothing to do with Plaintiff in Error paying a commission on Defendant in Error's stock in the event Defendant in Error was paid $220 a share and, therefore, no occasion exists in this case, if it should be held that Defendant in

Error is entitled to recover, that Plaintiff in Error should be required to pay the commission for the sale of this stock.

Not only was the instruction erroneous in that it eliminated from the consideration of the jury the commission which should be deducted from $220 a share, but it was likewise erroneous in that the jury was not permitted to make any allowances for the additional consideration individually contributed by Plaintiff in Error in order to obtain the price of $220 a share, if the stock was sold for that price. As shown above, Plaintiff in Error individually contributed his contract to retire from the meat packing business, guarantee of the book accounts on which he has already paid $22,534, and his agreement to give a portion of his time in the business. The instruction in the latter part deals "with equity and good conscience," which words we assume the District Court used because this is an element in action for money had and received. As we will later show, the court submitted this case on the theory of money had and received, and certainly if 'equity and good conscience" has anything to do with this case, the least that can be said is that the jury had a right to consider the fact that Plaintiff in Error had individually contributed these additional considerations for which a suitable allowance should be made in the verdict.

If this Court should hold that the instruction in question was within the evidence, and not objec-

tionable in form, yet for another reason the instruction should not have been given. We will later show, that notwithstanding the issues in this case as made by the complaint, was on the theory that Defendant in Error was entitled to recover by reason of violation by Plaintiff in Error of his duties as agent, and also by reason of misrepresentation, yet the District Court submitted the case to the jury also on the theory of a recovery for money had and received. It is the universal holding, we believe, of the courts, that a party cannot for the same wrong claim both in tort and assumpsit; that a claim in assumpsit is a waiver of any claim in tort, since the two actions are diametrically different, and the measure of recovery is governed by different rules.

> "An action for money had and received is an equitable action governed by equitable principles, and in it plaintiff waives all torts, trespasses and damages. * * *."
>
> 27 *Cyc.* 849.

> "The person entitled to waive a tort and sue in assumpsit, is the person who has been legally injured by the tort. * * * An election between inconsistent rights and remedies cannot be reconsidered even where injury has been by the choice, or would result from setting it aside. Hence, an election to waive a tort and to sue in *assumpsit* takes effect on the commencement of the action, whether it precedes the judgment or not; and an amendment of the declaration against the objection of defendant, changing the nature of the action from *assump-*

sit to an action on the case for deceit is unauthorized. The judgment rendered in the case will be a bar to any other form of action between the same parties for the same cause, for it is clear that a single cause of action cannot be split into two causes of action. * * *."

2 *R. C. L.* 760.

See also:

2 *R. C. L.* 753.

The measure of recovery is different where the action proceeds in tort from the measure of damages in *assumpsit*.

"Where an election has been made to sue in assumpsit rather than in tort, the basis of the action is the benefit which the wrong-doer has received rather than damages for the tort. * * * Where *assumpsit* is brought under the money counts, the recovery will be confined to the sum actually received by the defendant for the property."

2 *R. C. L.* 761.

II.

Specification of Errors 2, 3 *and* 4.

The three instructions given by the District Court to which these specifications refer, each contain practically the same objectionable language, such language, quoting from the first mentioned instruction, being as follows:

"Unless you find from the preponderance of the testimony that a part of the consideration for the sale of the stock owned by the plain-

> tiff was actually paid to and received by defendant, and was still retained by him. In the latter event the plaintiff is still entitled to the right to recover regardless of the question of agency."

We submit that these instructions were erroneous and require the reversal of the judgment of the lower court for the following reasons:

(1) The instructions were not within the issues as made by the complaint, or the evidence; the instructions, if within the issues, or the evidence, did not correctly state the law as applied to any evidence appearing in the record, if it should be held there was any evidence that the stock was sold for a price in excess of $200 a share. If the instructions were intended to refer to a state of facts not within the evidence, they were purely abstract instructions, and could not fail to mislead the jury to Plaintiff's in Error's prejudice.

(2) The theory of recovery, as here authorized, was not consistent with the theory of the complaint and the instruction discussed under Point I above, and the case could not be submitted on both theories.

(3) If these instructions were given on the theory that the action was for money had and received, the law was not correctly stated in that the "equity and good conscience" claims of Plaintiff in Error and Defendant in Error were not incorporated in the instructions.

(4) It was prejudicial error to emphasize this instruction by repetitions, leaving the jurors to infer that the District Court considered this feature of particular importance.

1. That the criticised portion of these instructions was not within the issues as made by the complaint, was clearly recognized by the District Court (Specification of Error 3). We further submit there was no such issue raised by the evidence. The record fails to disclose that Defendant in Error was attempting to make such issue, and necessarily Plaintiff in Error was required to have the case go to the jury on an issue foreign to anything raised by the pleadings, and without opportunity to meet the same. After the evidence had been introduced, and the arguments made, for the first time this issue was presented through the instructions of the court. With the character of the evidence which was introduced, it was scarcely less than a peremptory direction that the jury should find for Defendant in Error. This objectionable portion was a part of instructions in which the court had previously stated, that if Plaintiff in Error was not the agent of Defendant in Error, and did not sell his stock, and did not make any misrepresentations, then Defendant in Error could not recover. Immediately following this language was the objectionable portion above quoted. This must have carried the impression to the jury that, if Plaintiff in Error had profited as a result of

the sale of the stock of Hamilton and Hample, then he was liable. Manifestly, Plaintiff in Error would not be liable on these conditions; he had a perfect right, if he desired, to make an agreement with Armour & Co., that it pay him a commission on any purchases of stock, or an agreement that in the event it purchased any stock for less than $220 a share, it would pay him the difference, so long as Plaintiff in Error owed no duty to Defendant in Error, and made no misrepresentations inducing him to sell. If there is any evidence in the record of any nature or kind justifying such instructions as these, or if any inference can be drawn from the record justifying such instructions, the most that could be claimed would be that the jury was warranted in finding that Plaintiff in Error had an understanding with Armour & Co. that he was to be paid a commission, or that he was to be given the difference between the purchase price and $220 a share. There is no law which prohibited Plaintiff in Error from having such agreement, nor which would render him liable. When we consider that the District Court not only gave this instruction once, but three times, there can be no uncertainty as to the impression that was created on the mind of the jurors. The criticised portion of the instructions was given, conceding that Plaintiff in Error owed no contract duty to Defendant in Error, had violated no agency, had not sold Defendant in Error's stock, and had made no misrepresentations Given these conditions, which were the basis of the

instructions, there existed no legal or moral objection to Plaintiff in Error dealing with Armour & Co. as he saw fit.

We submit, however, as has already been discussed under Point I, above, that there was no evidence of any nature or kind to go to the jury on the question of Plaintiff in Error having received any part of the consideration from the sale of the stock of Hamilton and Hample. We have quoted at considerable length above from the evidence in the case bearing on this question, and respectfully ask the court in connection with these Specifications of Error to again consider such evidence. We think that an examination of this evidence can lead to but one conclusion, and that no inference contrary thereto can be drawn, which is this: Armour & Co., finally, was willing to purchase a majority, or all, of the stock of E. H. Stanton Company, the agreement of Plaintiff in Error to withdraw from the packing business in the four states mentioned in the contract, the guarantee by Plaintiff in Error of the accounts receivable, and the agreement of Plaintiff in Error to assist in the business, and was willing to pay a lump sum for all of these considerations, which would aggregate an amount produced by multiplying the number of shares acquired by $220. There is no evidence or inference from the evidence which will produce any different result. The stock was owned by different individuals, including Plaintiff in Error, Defendant in Error,

Hample, and others. The right of Plaintiff in Error to do business, the guarantee of all of the accounts, and the agreement to assist in the business were purely personal to Plaintiff in Error. Neither Hamilton, Hample, or any other stockholders of the E. H. Stanton Company, had any right to receive any benefit that flowed from the purchase of these added conditions and agreements. They were valuable considerations, and the purchase price thereof belonged to Plaintiff in Error. All the evidence shown by the record squarely contradicts the claim that Plaintiff in Error received anything on account of Hamilton and Hample's stock, and there is no inference that can be justly drawn from the record that he did receive any part of such purchase price. To even speculate, or guess, that he received any part of such purchase price is to say that he voluntarily, and without consideration, made a gift of these three agreements, which necessarily went to swell the purchase price of the stock of Hamilton and Hample.

When we consider that it must be the contention that Plaintiff in Error made such gift at that time, and at the same time had formed a secret plan to misrepresent the facts to Hamilton and Hample, and rob them, the utter unreasonableness of the contention is at once apparent. Such a contention violate every principle of reason, and the mind cannot accept such claim. To say in one breath that Plaintiff in Error was scheming to cheat and

defraud, and in perpetrating such fraud voluntarily made this gift, is to appeal to the wildest fancy. The natural query is, Why was it necessary to perpetrate a fraud, or to steal, when the stake involved could be legitimately and properly acquired? The evidence is conclusive, and there is no contradiction that Armour & Co. would not purchase the stock without acquiring these additional agreements, which belonged solely to Plaintiff in Error, and which he alone could sell. (Trans. 80, 100-101, 105.)

We can conceive of but two possible constructions of these criticised instructions: (1) Even though Plaintiff in Error was not an agent, and made no misrepresentations, yet that he is liable if by any arrangement he made a profit through Armour & Co. purchasing Defendant in Error's stock; (2) That he was liable if any of the purchase price of Defendant in Error's stock was paid to him by Armour & Co. for the use and benefit of Defendant in Error.

That Plaintiff in Error would not be liable in the absence of breach of agency, or fraud and misrepresentation, if he made a profit either by way of commission, or otherwise, out of this purchase by Armour & Co., it seems to us, is at once manifest. As has been suggested before, he had a legal and moral right, if he so desired, to act as agent for Armour & Co., or to have any other agreement which he might be able to obtain from Armour &

Co., whereby he was to receive a consideration on the purchase of the stock. To hold otherwise would be to say that an ordinary broker is liable by reason of having received a commission, or that the ordinary broker is liable to the etxent of any compensation which he has received. We do not wish it to be understood that we concede that Plaintiff in Error had any such agreement with Armour & Co., since under the evidence, as we understand it, it conclusively appears that the only money received by Plaintiff in Error was as consideration for his own stock at the price of $200 a share, and the remainder in consideration of his three additional agreements.

If it should be argued by Defendant in Error that this was an action for money had and received, and that there is any rule in such an action which would authorize such instructions, such contention would be wholly without foundation. The action for money had and received proceeds on the primary principles that the defendant has something which does not belong to him, and which does belong to the plaintiff.

If it should be calimed that this instruction had to do with a state of facts, where money was paid to Plaintiff in Error for the use and benefit of Defendant in Error, it is sufficient to say that there was no such claim made, and such claim would be not only against the positive evidence to the contrary, but likewise against any inference that could

be drawn from the testimony. Such a basis in the evidence, however, is the only one that could exist which would make the instruction as given abstractly correct. The contract with Defendant in Error clearly shows that it was not intended that he was to receive more than $200 a share; there is nothing in the testimony indicating, either inferentially, or otherwise, that there was an additional amount paid, or to be paid, for his benefit. The money paid Plaintiff in Error was the amount only that his contract required should be paid for his own stock and the three additional agreements to be performed by him. If it could be argued that anything was paid Plaintiff in Error in excess of what he was entitled to receive, the argument would necessarily have to proceed on the assumption that he had violated some agency agreement, or had committed a fraud, which elements the court excluded from these instructions. It follows, therefore, we think conclusively on this theory of the purpose of the District Court, the instructions were purely abstract and misleading to the prejudice of Plaintiff in Error.

14 *R. C. L.* 782, and cases cited.
14 *R. C. L.* 786, and cases cited.

Goodman v. Simonds, 61 U. S. 343 (15 L. Ed. 934, 939).

Blackburn v. Crawford, Lessees, 70 U. S. 175 (18 L. Ed. 186, 194).

Buyken v. Lewis Construction Co., 51 Wash. 627 (99 Pac. 1007).

Central Georgia Power Co. v. Cornwell, 76 S. E. (Ga.) 387, 389.

2. As we have already shown, this case was submitted to the jury on the dual theories: (1) Tort; (2) Money had and received. These theories were inconsistent, and it was error to send the case to the jury on both theories.

The vice of the instructions in this respect is that, in the first portion of the instruction embodied in Specification of Error 3, the jury is told that the theory of complaint is that Plaintiff in Error had practiced fraud and deceit upon Defendant in Error, and had violated his duties as agent to Defendant in Error's damage, and that if the jury found this to be true Defendant in Error might recover damage, to-wit: $20 a share; but that if he failed to establish these necessary facts, he might still recover, if Plaintiff in Error had received any part of the consideration for the sale of Defendant in Error's stock, such sum as had been paid to Plaintiff in Error and was still retained by him. This was clearly a submission to the jury of two distinct and inconsistent theories, with permission, if they found Defendant in Error had proven his case on either theory, to return a verdict in his favor.

Defendant in Error acquiesced in the court's statement as to the theory of the complaint. In fact it can not be doubted that the theory of the

complaint is correctly outlined by he court. The qualification to this instruction, however, submits the case to the jury on the theory of money had and received, the co-relative of tort, and it becomes necessary to determine the distinction between these theories in order to ascertain whether or not Plaintiff in Error was prejudiced by this submission.

The very theory of the action of money had and received is that the defendant has committed a tort to the damage of the plaintiff and to the profit of himself; that the plaintiff waives the damage to himself and, ratifying the contract by which the defendant has profited sues to recover the amount by which the defendant has unjustly enriched himself. The elements of this sort of action are, that the defendant has committed a wrong (a tort) against the plaintiff, that this wrong has resulted in an enrichment of the defendant, that the plaintiff waives the damages for the wrong and sues for the amount by which the defendant has been enriched as for money had and received to the use of the plaintiff.

In discussing this form of action a well known author says:

> "We now proceed to consider a limitation to which the action of *indebitatus assumpsit* is subject where the plaintiff waives the tort and sues on the contract. In the leading case of *Lamine v. Dorrell* the conversion was accomplished by selling, and the action was brought to recover the proceeds. In theory such act-

ual conversion into money or its value is always necessary.

"There are two reasons for this. The count for money or goods had and received is founded on equitable theory, and it is necessary that there should be a property right on which liability can be predicated. The converter is held liable in respect to the proceeds acquired by him in exchange for the property, as a sort of trustee *ex maleficio*. Again, being *in consimili casu* with debt, this count has inherited from that action the limitation that it can be maintained only where there is a duty to turn over money or goods ascertained in amount or capable of being reduced to certainty. This requirement is fully met in situations where there has been a sale or exchange of the converted goods, but it is not met in the absence of actual sale or exchange.

"It will thus be perceived that the duty upon which the implied contract is here predicated is a duty to disgorge the proceeds of an unlawful acquisition, and not upon the mere general duty to compensate for injury done. From this it follows that in actions of this kind the plaintiff can recover of the defendant only so much as he has actually received for the goods irrespective of their actual value.

"On general principle the rule is that wherever one person commits a wrong or tort against the property of another, with the result of benefiting his own estate, the law will, at the election of the party injured, impose a contractual duty on the wrongdoer to pay the party injured the full value of the property appropriated; and this duty may be enforced by the action of *indebitatus* in some of its forms.

"The proposition just stated indicates the point beyond which the fiction of contract cannot be indulged. No form of *indebitatus* will lie to recover damages for a merely destructive trespass. It is essential that there should be an unjust enrichment of the estate of the tort feasor. This limitation will be found to be inherited from the action of debt. To create a common-law debt, the *quid pro quo* must accrue as a benefit to the debtor, and at the same time it must move from the creditor. So here the loss of the plaintiff must be the gain of the defendant. It is not sufficient that the plaintiff suffers a detriment. The legal duty to make reparation for damage does not by implication raise a promise to pay such damage.

"The distinction now being considered has not, as might be imagined, lost its importance with the abolition of forms of action, for it is implicated with the question whether the right of action survives after the death of a party; and apart from statute the survival of rights of action is unaffected by the abolition of forms."

Foundations of Legal Liability (Street), Vol. III, 196-197, 199-200.

Keener in his work on quasi-contracts says:

"If any one in the commission of a tort enriches himself by taking or using the property of another, the latter may in some cases, instead of suing in tort to recover damages for the injury done, sue in *assumpsit* to recover the value of that which has been tortiously taken or used. The remedies in tort and *assumpsit* not being concurrent, a plaintiff is compelled to elect which remedy he will

pursue; and if he elect to sue in *assumpsit,* he is said to waive the tort. The doctrine of waiver of tort is simply a question of the election of remedies. Said Allen, J., in *Cooper v. Cooper,* 147 Mass. 370:

"'The same act or transaction may constitute both a cause of action in contract and in tort, and a party may have an election to pursue either remedy; and in that sense may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty of pay damages for a tort does not imply a promise to pay them upon which *assumpsit* can be maintained.'

"With equal propriety, therefore, when an election is made to sue in tort, one could say that the quasi-contractual obligation is waived. It is usual, however, to speak of waiver of tort only for the reason that the remedy in tort is the older. The tort is, however, waived only in the sense that a party having a right to sue in tort or *assumpsit* will not, after he has elected to sue in *assumpsit,* be allowed to sue in tort. By such an election that which was before the election tortious does not cease to be so. *In fact, when the assumpsit is brought, it is only by showing that the defendant did a tortious act that the plaintiff is able to recover.* There being no contract between the parties, *unless the defendant is guilty of some wrong the plaintiff can establish no cause of action against him.* Had not this almost self-evident proposition been lost sight of, because of the fiction of a promise involved in the action of *indebitatus assumpsit* when brought to enforce a right of action not resting on contract, much of the confusion in, and conflict of, decisions now existing would have

been avoided. The continuance of such a fiction (existing for the purposes of a remedy only) cannot be justified, to say nothing of its extension, in those jurisdictions where all forms of action have been abolished. In such jurisdictions the inquiry should be, not as to the remedy formerly given at common law, but as to the real nature of the right.

"Assuming a defendant to be a tort feasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort."

The Law of Quasi-Contracts (Keener), 159-160.

See also:

27 *Cyc.* 849.
2 *R. C. L.* 753, 760 and 761.

As we suggested before, it is not the fact of damage which determines the recovery in the action of money had and received, but it is the enrichment of the defendant by the tortious taking, the tort being a necessary incident in the proof.

"An action lies against one into whose hands money actually belonging to the plaintiff can be traced as well as where he received the money in the first instance. But the recovery must be limited to cases where money is received for plaintiff by someone standing in a fiduciary capacity to plaintiff * * *."

27 *Cyc.* 869.

"One who has been induced by the fraudulent representations of another to enter into a contract may affirm it and maintain *assumpsit* for a breach, or he may disaffirm it and maintain tort; but if he disaffirms and brings a tort action he can not afterwards turn it into an action of *assumpsit* and recover as for an implied promise. As a general rule, the tort may be proved and recovery had in an action of *assumpsit* in all cases where one has been fraudulently induced to part with his money or personal property other than money * * *."

2 *R. C. L.* 759.

"The full determination of all these questions does not appear to be necessary to the proper disposition of this motion. The patented inventions were property of the orator. When the Windsor Manufacturing Company sold machines embodying these inventions to the defendants for use it invaded the orator's rights and converted the orator's property to its own use. These acts were tortious and an action would lie for these wrongs. As that company received money for the orator's property, the orator could waive the tort and sue in *assumpsit* for the money, or, what is the same in effect, proceed for an account of the money received. In an action or proceeding for the money the measure of damages would be the amount of money received, not the amount of damage done, and all right of recovery beyond that would be waived. This is the effect of waiving the tort. The recovery of satisfaction in either form would pass the right to that for which satisfaction was had, and there could be no damages beyond. Upon these principles, which are elementary, when the orator has recovered and received satisfaction for the tort committed by the sale and

> conversion of so much of its property, its title to so much of its property will have passed, and no damages could accrue to it on account of further use of that property. By the satisfaction the machines would be freed from the orator's monopoly."
>
> *Steam Stone Cutter Co. v. Sheldons,* 15 Fed. 608 (609).

Having in view the origin from which has sprung the action of implied contract for money had and received, it is quite apparent that a lawsuit may not proceed upon both of these theories at the same time, even though under the reformed practice act in effect in the State of Washington, the plaintiff is required to state all the facts going to make up his cause of action.

There are two reasons why it was an error for the trial court to submit the questions to the jury in this form. 1. As previously suggested the proof to establish the different theories is different. 2. The measure of damages is different.

It is the universal holding of the cases that in such a situation as this a suit upon an implied contract waives the damages by reason of the tort and, as a correlary to that, a suit upon the tort waives any claim upon implied contract. In the one form of action the plaintiff relies upon the wrong which has been done him and sues to recover his damages. His recovery in this case is measured by the amount of his loss and the question as to whether or not the defendant has benefited by the

wrong is not material. If he sues upon the implied contract he necessarily affirms and adopts the act by which the defendant has been enriched at the plaintiff's expense and in this case the plaintiff is entitled to recover the amount by which the defendant has been so enriched. There can be no recovery, however, both for the damages and for the amount of the enrichment, which is quite apparent.

It will be observed that by the instruction criticised in Specification of Error 3, the jury at its election was permitted to return a verdict against Plaintiff in Error either on the theory of tort, or money had and received. In the *Western Assurance Company v. Towle,* 65 Wis. 247, the court held that the action was brought on the theory, first, of money had and received, in that it was claimed that the plaintiff had fraudulently made misrepresentations as to the amount of loss by fire; and, second, on the theory that the defendants, who collected the insurance, had themselves destroyed their own property. The case was submitted to the jury on both theories. The court at page 257 says:

> "As there was a general verdict only in the case we can not determine whether the jury found in favor of the plaintiff for the whole amount paid by plaintiff upon the policy, on the ground that the fire which caused the loss was set, or caused to be set, by the defendants themselves, or by one of them, or upon the

ground of fraudulent and false proofs of loss in over-valuing the property destroyed by fire.

"Had there been no proof which would have justified the jury in finding that the defendants, or one of them, set fire to the insured property and so caused the loss the verdict should have been, not for the whole amount of money paid by the Company for the supposed loss, but for so much only as the amount paid exceeded the actual loss sustained by the insured. The action for money had and received is in some sense an equitable action, and the insurance company having voluntarily paid the money on an alleged loss claimed by the defendant, they can only recover back so much as in equity and good conscience they ought not to have paid."

In the case of *Gabrielson v. Hague Box & Lumber Company,* 55 Wash. 342 (104 Pac. 635), the action was brought on a contract on two theories of recovery, first, damages for its breach; and, second, upon a *quantum meruit.* The case was tried and submitted to the jury on both theories and a verdict returned in plaintiff's favor. The court at page 345 says:

"* * * These questions would more properly be for the jury, if submitted under issues properly framed, and would not be considered by us but for the reasons to which we shall presently advert. It is the privilege of a party to have his cause submitted to a jury upon a distinct issue. It is the duty of the court to exercise its judgment and see to it, although the pleadings had tendered an unwarranted issue, that an issue unsustained is not left to the jury for its consideration. To prevent

situations such as we have here is one of the purposes underlying the reform method of pleading. A person can have but one cause of action arising out of the same subject-matter, and this he must state in plain and concise language and without repetition * * *."

Continuing, the court at page 346 says:

"* * * The court, however, not only did not withdraw the second cause of action from the jury in so far as the logs and the logging road were concerned, *but left it to the jury to determine whether one or both causes of action were before them, and upon this to fix the amount of recovery. It was left to the jury to determine the issue as well as the fact.*" (Italics are ours.)

If Defendant in Error should contend that the complaint was not drawn upon the theory of tort, or that the case was not tried upon such theory, it is quite apparent that such contention would be without merit. A tort, in its generally accepted term, is the breach of an obligation, or duty, imposed by law. It is sometimes defined as a wrong independent of contract, but this is not entirely accurate since a contract may give rise to a legal relation in which a duty rests upon one or the other as a matter of law, and the breach of this duty will then be a tort; such is the case here. By virtue of the contract pleaded in the complaint (if such contract existed) Plaintiff in Error became the agent of the Defendant in Error. This relation is governed by certain principles of law, one

of which holds the agent liable in case he takes any unfair advantage, or by concealment, profits at the expense of the principal. The breach of this duty is a tort, notwithstanding the fact that the relationship grows out of a contract.

> "The exclusion of proof of the contract for re-establishing the depot, and the willful and intended breach of that contract, brings up for our consideration the question principally argued. * * *
>
> "We are forced back, therefore, to the contract for re-establishing the depot and its breach as the basis or foundation of the tort pleaded. If that will not serve the purpose in some manner, by some connection with other acts and conditions, then there was no cause of action for a tort stated in the complaint. We are thus obliged to study the doctrine advanced by the respondent, and measure its range and extent. It rests upon the idea that unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty, born of the relation established to do the same thing. In such a case, and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that upon a breach of the contract there is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused; there is constructive fraud, or a neg-

ligence which, at bottom, makes the breach of contract actionable as a tort. (*Coggs v. Bernard,* 2 Lord Raym, 909; *Orange Bank v. Brown,* 3 Wend. 161, 162.)"

Rich v. New York Cent. & Hud. River R. R. Co., 87 N. Y. 394.

"Nevertheless it is the contract, without which the relationship could not exist, which brings these rights into existence; and the rights and duties vary with the contracts. Thus a railroad company owes one set of duties to the person in its contract to carry a passenger, another to its employe, and a still different set of duties to a person with whom it has no contract. The same principle applies in a large measure to the reciprocal rights and duties of physicians and patient, attorney and client, owner and architect or contractor, and in many other cases, as a telegraph company and the sender of a message, an vendor and vendee, a bank and a depositor, and the like. There is a body of law outside of the agreement of the parties prescribing rights and defining duties not directly contemplated by the parties, but a breach of which is actionable as a tort."

Jaggard on Torts, Vol. 1, page 23.

As is pointed out heretofore, the measure of damages when the action is on implied contract is different from the recovery permitted where the action is brought for the tort, but notwithstanding this the fraud or wrong involved is a necessary element to establish recovery upon the implied contract.

"Mere complicity in a forgery or other crime does not, as matter of law, render every guilty

> party liable in a civil action, *ex contractu,* for money had and received, or as borrowers, to every person who has been defrauded of money by means of such crime. To charge a party in an action of that character the receipt of the money by him, directly or indirectly, must be established. His complicity in the crime is not the cause of action, but only an item of evidence tending to establish his interest in the proceeds."
>
> *National Trust Co. v. Gleason et al.,* 77 N. Y. 404.

Even if this court could say that the action did not sound in tort as the issues were framed in the complaint, the result would be the same. The case was submitted by the District Court to the jury on both theories, tort and money had and received. This appears from the several instructions criticised, and particularly from the one incorporated in Specification of Error 3.

3. If it was proper under the pleadings and evidence to submit this case to the jury on the theory of money had and received, there is still a further question as to the correctness of the instructions.

It will be observed that in submitting the case on the tort theory, the District Court incorporated the element of "equity and good conscience" (Specification of Error 1). However, in submitting the case on what we conceive to be a theory of recovery for money had and received, the District Court

eliminated all questions of "equity and good conscience."

> "An action for money had and received is an equitable action governed by equitable principles and in it plaintiff waives all torts, trespasses and damage. It may in general be maintained whenever one has money in his hands belonging to another, *which in equity and good conscience he ought to pay over to that other. But where money is paid to a person he receives it with a good conscience, and uses no deceit or unfairness in obtaining it, assumpsit for money had and received will not lie to recover it,* even though it was paid by mistake; nor will the action lie where plaintiff upon the same transaction, would be liable to a cross action to recover damages to an equal amount." (Italics ars ours.)
>
> 27 *Cyc.* 849.

> "* * * The action for money had and received is in some sense an equitable action, and the insurance company having voluntarily paid the money on an alleged loss claimed by the defendants they can only recover back so much as in equity and good conscience they ought not to have paid."
>
> *Western Assurance Co. v. Towle,* 65 Wis. 247 (257).

4. It will be observed that in each of these instructions referred to in Specification of Errors 2, 3 and 4, the District Court has used practically the same language. If the instructions were proper, a repetition could have had no effect, but to unduly impress upon the mind of the jurors the thought that the District Judge considered this

element of great importance, and desired to impress that thought firmly in the mind of the jurors. It could not have been otherwise than highly prejudicial to Plaintiff in Error.

> "Instructions should be plain, easily understood by the average mind, and concise. * * * The purpose of instructing a jury is to aid them in arriving at a proper verdict, and in order to accomplish the desired purpose instructions should not be repeated, but when once given, presenting a particular theory of a case, no other instruction should present the same theory, as this would destroy their very purpose and mystify, confuse and mislead the jury. * * * Nor should statements of the law applicable to the case be given undue prominence by repetition or otherwise."
>
> 14 *R. C. L.* 778, and cases cited.

In *New York L. E. & W. R. Co. v. Winters,* 143 U. S. 60 (36 L. Ed. 71), the court at page 80 of the Law Edition says:

> "What we have said above virtually disposes of these requests. In so far as they are correct, the substance of them had been given by the court in its general charge, and there was no error, therefore, in refusing to give them in the language requested. * * * In fact, it is much the better practice to refuse to give instructions to the jury, the substance of which has already been stated in the general charge, than to repeat the same charge in different language, although the charge requested may be technically correct as an abstract proposition of law; for a multitude of instructions, all stated in different language and meaning the

same thing, tends rather to confuse than to enlighten the minds of the jury."

In *Chicago M. R. Co. v. Alexander,* 47 Wash. 131 (91 Pac. 626), the court says at page 138:

"Appellant contends that the trial court erred in unnecessary repetitions of its instructions, especially of those favorable to respondents. It contends that such action had a tendency to place undue and particular stress upon such instructions, was prejudicial to appellant, and constituted reversible error. The instructions were frequently and unnecessarily repeated. In view of the new trial to be granted herein, we will state that such a course should be avoided by trial judges. In *Meachem v. Hahn & Co.,* 46 Ill. App. 144, 149, the court, commenting on repeated instructions, well said:

" 'Counsel may select the strong and salient points appearing, and seek in the argument to direct the thought of the jury to them as being the important and controlling features of the case, but the instructions of the court should not be made the medium for conveying such views to the jury.'

"Although a judgment might not in every instance be reversed for such unnecessary repetitions, it might in furtherance of justice sometimes become necessary to grant a reversal. 1 *Blashfield, Instructions to Juries,* Sec. 108; 2 *Current Law,* 470."

III.

Specification of Error 5.

This specification of error has to do with the only question involved in this case which is not

involved in the Hample case. After Defendant in Error contracted to sell his stock to Armour & Co. on May 21, 1917, his stock was deposited with a bank at Butte, as required by the contract. Armour & Co. did not comply with its part of the contract within the time stipulated, and after a default had occurred for several days Defendant in Error withdrew his stock from the bank. (Trans. 58.) While the situation remained in this condition, Defendant in Error, on June 4, 1917, wrote Armour & Co. as follows:

> "I took the stock out of the bank eight days later than the appointed time. I want to sell my stock but want the same price that Mr. Stanton gets for his. I don't want Mr. Stanton to make $25.00 per share on my stock. He told Mr. Hample and myself that Two Hundred ($200.00) Dollars per share was the limit you would give and we were getting exactly the same as he was. I now find out through Mr. Fred B. Grinnell of Spokane, that he had an option from Mr. Stanton on my stock, Two Hundred Twenty (220.00) per share, that is, an option on five thousand and eighty (5080) shares at that price, and your Company was willing to take the said stock at said price. Mr. Stanton obtained permission to sell my stock by false representations and fraud of the worst kind. I am willing to let your Company get this stock if you want it at the price you pay for Mr. Stanton's stock." (Trans. 61.)

Subsequent to making his contract on May 21 with Armour & Co., Defendant in Error himself, purchased the stock in E. H. Stanton Co. owned

by the Overholt Estate, 773 shares, at $190 a share. (Trans. 119-120.) Defendant in Error, in his letter to Mr. Kizer of June 14, 1917, said:

> "I was informed that Mr. Good wanted an option on the Overholt stock at Two Hundred ($200.00) Dollars. He is with Wilson & Co. I suppose Armour & Co. will not want to buy that stock for a year, as Mr. Stanton has that time to deliver it to them. If that is not the case, you know where the stock is." (Trans. 66.)

Thereafter, and on or about the 23rd day of June, 1917, Defendant in Error delivered to Armour & Co. the 1096 1/3 shares involved in this action and the 773 shares acquired from the Overholt Estate.

From the above it appears that Defendant in Error at least as early as June 4, 1917, had as much information, on which complaint could be made, as he had at any time. He then had the understanding that Plaintiff in Error had profited through the sale of his stock, and that such profit was $25 a share; that Plaintiff in Error had received more than $200 a share for his own stock and had an agreement with Armour & Co. whereby that Company was to purchase any other stock which Plaintiff in Error might obtain within a certain time at $220 a share. If, therefore, Plaintiff in Error made any profit on Defendant in Error's stock, or had sold his own stock for a higher price than Defendant in Error had received, it ap-

pears that Defendant in Error was now advised of such situation. Based on this condition of the record, Plaintiff in Error submitted his fifth requested instruction (Trans. 26) which was given in a modified form by the District Court, and this action is the foundation of Specification of Error 5.

We submit that it was error in the trial court to qualify the said instruction by the addition of the part italicized in the Specification of Error 5. It clearly appears that Defendant in Error had repudiated his contract and retaken his stock under the same claim that he is now making, namely, that Plaintiff in Error had violated his agreement, and that there had been fraud and misrepresentations. It was wholly immaterial to this question whether Defendant in Error in subsequently delivering the stock to Armour & C. did so pursuant to the original contract, or a new and independent contract.

It is difficult to understand how it could be said that the Defendant in Error was delivering his stock pursuant to the contract entered into in Spokane, in view of the evidence. It cannot be doubted that if the Defendant in Error had rescinded the contract first made, that he must of necessity delivered his stock under some new agreement, and whether the amount of consideration therefor was the same, or different, is immaterial.

The Defendant in Error had placed his stock in the bank pursuant to the contract, but Armour &

Co., through an oversight, failed to deposit the notes and money as they were required to do. Thereupon the Defendant in Error withdrew his stock and he was fully justified in doing so, and by that act the contract entered into came to an end. This is the construction which he placed upon it at the time, after having secured legal advice as to his rights. (Trans. 61.)

On June 4th he telegraphed to Mr. Robbins as follows:

> "Your failure by ten days to comply with contract releases me. See letter copy sent." (Trans. 59.)

In the letter mailed to Armour & Co. of the same date he said:

> "I am willing to let your company get this stock if you want it at the price you pay for Mr. Stanton's stock." (Trans. 61.)

In his letter to Mr. Kizer, dated June 14th, he said:

> "* * * They can buy it from me as cheap as they did from Mr. Stanton. I want them to get the stock if they want it and will not sell to any of their competitors. If I don't sell to them, I will be their partner." (Trans. 66.)

The foregoing statements by the Defendant in Error are ample evidence that he did everything in his power to terminate the contract, and that he fully intended to do so, and that so far as he was

concerned the contract was completely at an end. The law upon this question is well settled.

> "323. Effect of Rescission. — Generally speaking, the effect of rescission is to extinguish the contract. The contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken. Accordingly, it has been said that a lawful rescission of an agreement puts an end to it for all purposes, not only to preclude the recovery of the contract price, but also to prevent the recovery of damages for breach of the contract.
>
> 6 *R. C. L.* 942.

> "Generally speaking a rescission abbrogates the contract, not partially but completely, and after a binding election to rescind a party cannot insist on rights thereunder, but each of the parties is returned to his previously existing rights."
>
> 13 *C. J.* 623.

> "If the contract was then broken that was the time for the plaintiff to have exercised its right to election as to whether it would go on under the contract or treat it as rescinded, and, having chosen the former course, it is now too late to adopt the latter." (393.)
>
> *Fore River Ship Building Company v. Southern Pacific Company,* 219 Fed. 387.

The case of *Hays v. City of Nashville,* 80 Fed. 641, involves the question of rescission, and the distinction between rescission and abandonment. The court, speaking through Judge Taft, says:

> "It is well settled that a technical rescission

of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract. But besides technical rescission, there is a mode of abandoning a contract as a live and enforceable obligation, which still entitles the party declaring its abandoncent to look to the contract to detercine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment." (645.)

"It very frequently happens that laymen do not distinguish between these two ways of ending a contract, and, therefore, that words are used by a party which, literally and strictly construed, would effect a complete rescission and destruction of the contract, when the party's real intention is only to declare his release from further obligation to comply with the terms of the contract by the default of the other party, and his intention to hold the other for damages. In such cases, courts consider, not only the language of the party, but all the circumstances, including the effect of a complete rescission upon the rights of the parties, and the probability or improbability that the complaining party intended such a result, in reaching a conclusion as to the proper construction of the language used." (646.)

In the instant case Defendant in Error cannot possibly contend that he elected to consider himself released from the contract and to hold Armour & Co. for damages. On the contrary it is apparent from all the evidence that he intended to rescind the contract so far as he possibly could and

to sell his stock to Armour & Co. together with the Overholt stock which he had purchased, for as much money as he could get irrespective of the old contract. Moreover, he was claiming the right to rescind not only because Armour & Co. had failed to comply with the agreement, but because he claimed someone had informed him that Stanton had gotten more money than he, Defendant in Error, had received, and that fraud had been practiced upon him. When he sold his stock to Armour & Co. it was clearly his intention to recoup his damages by selling at the advanced price, which he did. (Trans. 120.)

But, if it can be said that there was not a completed rescission, and Defendant in Error did not make a new contract we think the result must be the same. It will be observed that Defendant in Error, in his communications to Armour & Co. claimed a right to rescind, not only on the ground that payment had not been made as stipulated, but likewise on the ground that Plaintiff in Error was his agent in making the sale, and had been guilty of fraud and misrepresentations in the premises. The correspondence shows that he had at this time as much knowledge concerning the facts as he had when this suit was brought. He further testified, on the trial of this case, that he notified Armour & Co.'s representatives prior to making the original sale that Plaintiff in Error was acting for him, and that he was to receive the same

for his stock as Plaintiff in Error (Trans. 69-70). If this is true, and he is bound by his testimony, then he had a perfect right to rescind the contract as against Armour & Co., which had been done. Under the testimony of Defendant in Error, Armour & Co. also knew, if it was a fact, that a part of the purchase price of Defendant in Error's stock had been paid to Plaintiff in Error. Armour & Co. knew not only that there had been a violation of the agency, but that a fraud was being committed on Defendant in Error and were in no better position than was Plaintiff in Error. Defendant in Error's right to rescind under his evidence was complete and he exercised his election, and could not subsequently deal with Armour & Co., either by a new and independent contract, nor by permitting Armour & Co. to exercise any rights, which it claimed under the original contract.

IV.

Specification of Error 6.

It follows from what has been said above, if our contentions are sound, that the evidence did not warrant a judgment in Defendant in Error's favor, and that in any event prejudicial errors were committed by the District Court, and the judgment should not have been entered. We have already discussed all questions leading up to the entry of judgment, and it will not be necessary to repeat.

$25,000 *Note Transaction.*

Since it is doubtful whether Plaintiff in Error will have an opportunity to file a reply brief in this case, and Defendant in Error may in his brief claim that the $25,000 note transaction has some bearing on this case, we have deemed it advisable ourselves to refer to the evidence. This note transaction, however, in our opinion, has not the slightest bearing on the questions involved on this Writ of Error.

E. H. Stanton Company was incorporated in 1904 and had conducted a highly prosperous business, with the result that at the time of the sale of stock to Armour & Co. the net value of the business was approximately $1,250,000. The corporation was organized by Plaintiff in Error, he at all times was its President, General Manager, and had nearly exclusive control of the conduct of the business. (Trans. 102.) Hamilton, Hample and the Overholt Estate were the only other large stockholders. Hamilton and Hample lived in Butte and once or twice a year would visit the plant for a day or so, and in the month of January each year would receive the annual statement of the business of the corporation, which was forwarded by Plaintiff in Error. (Trans. 51, 102.) During all these years Plaintiff in Error's salary was $300 a month, which manifestly was very inadequate compensation for such services in a corporation of that size. Plaintiff in Error was indebted to the corporation on a

note for $25,000, of which note Hamilton and Hample had knowledge. (Trans. 50, 53, 102.) The sale made by Hamilton and Hample of their stock to Armour & Co. was on May 21, 1917. (Trans. 50, 53, 56, 102.) On Saturday, May 19, 1917, the Trustees of E. H. Stanton Company (Hamilton and Hample being present and consenting) passed a resolution cancelling this note "as additional compensation for services rendered to E. H. Stanton Co. since 1905." (Trans. 74.) The representatives of Armour & Co., before they purchased the stock of Plaintiff in Error, Hamilton and Hample, had knowledge of the cancellation of this note. (Trans. 56, 90.) Hample, in testifying concerning the note in connection with a claim of Grinnell for commission, said:

> "He" (Stanton) "said it would not amount to anything, and that if he had to pay any commission it would come out of him; he had planned to cover it from the notes and automobiles that he had received, that he was to have, meaning the $25,000 note. That is the only time commissions were ever referred to." (Trans. 50.)

Hamilton testified:

> "When Mr. Hample and I and Mr. Stanton and Fred Stanton were out at Mr. Stanton's residence this question was brought up and it is my recollection that Fred Stanton drew up a resolution with a pencil and paper. I am not sure that he signed it that day. It was passed and signed either Sunday night or Monday. I think the automobile was in the same

resolution, but I am not sure. I think he said that the reason for releasing this was that Mr. Stanton might have some commission to pay and Mr. O'Hern told me that we could put that in as commission, compensation or anything we might think reasonable. He said we would have to assign some excuse." Trans. 54.)

The same witness further referring to the same matter testified that on Saturday morning (June 19) he met Mr. O'Hern and O'Hern said:

"He told me that Mr. Stanton was very unreasonable; that he wanted too much. He wants a whole lot of things that is unreasonable. He wants his note cancelled and he wants an automobile. He says, 'If you people do come to a deal you can do that, but the old board would have to do it,' and I says, 'I figure that would amount to about $30,000.'" (Trans. 56.)

Further the witness testified in referring to Grinnell:

"Anyway, Mr. Stanton said this man thought he ought to have some commission and that he was taking care of that, that it wouldn't cost us anything. He did not mention commission at any other time." (Trans. 57.)

The witness repeats the substance of his conversation with O'Hern at pages 69 and 70 of the Transcript, and then proceeds to say:

"I know this resolution in regard to the note was drawn up at Stanton's house and I may have signed it there." (Trans. 70.)

O'Hern testified concerning this subject as follows:

> "That among the notes payable was an item due by Stanton to the Company for $25,000.00. The old directors of the Stanton Company voted to release him from it, to cancel it." (Trans. 90.) "That he meant the meeting was held previous to the trade." (Trans. 91.)

Plaintiff in Error testified on this subject as follows:

> "On Saturday afternoon while Hamilton and Hample were in Spokane I told them I would like to have the note cancelled because they could sell their stock for just as much money with that note cancelled as not. I told them that I worked pretty hard and I had been successful and had made them quite a lot of money, and they said it was absolutely all right with them.
>
> "I talked it up with Fred and he talked it over with Mr. Hamilton and Mr. Hample and drew up a resolution which was passed before Armour & Company knew anything about it." (Trans. 107.)

In the above quoted evidence (and we have intended to quote all bearing on this question) we find nothing which has any bearing on any question involved in this case.

We, therefore, submit from any viewpoint of this case there has been a miscarriage of justice, and if we are entitled to urge that question (no motion for non-suit having been made in the lower

court), that judgment should be directed in favor of Plaintiff in Error; but in any event, for the errors above discussed, the judgment of the lower court should be reversed.

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. H. STANTON,
Plaintiff in Error,
vs.
J. L. HAMILTON,
Defendant in Error.

No. 3538

Error to the United States District Court for the Eastern District of Washington

BRIEF FOR DEFENDANT IN ERROR

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Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

(Note. The case of Hample vs. Stanton and Hamilton vs. Stanton were tried together, although not formally consolidated. There was, therefore, but one record in the case. Separate writs of error were sued out and separate bills of exception have been sent to this Court and the cases are assigned for argument at the same time. The only difference in the printed record is a slight discrepancy in the pages upon which certain portions of the evidence appear, and the only difference in the briefs is that in the Hamilton case there is a question of attempted rescission. The time alloted us for preparing our briefs in the two cases being very short, so that there was question whether the printer could get out two briefs in time, we have prepared a brief which is the same in both cases, entitling one set in each of the cases. The bracketed figures indicate page references to the printed record, and the printed record referred to in all cases is that in No. 3537, Stanton, Plaintiff in Error, vs. Hample, Defendant in Error.)

The material part of the statement of the case made by Stanton's counsel is based upon testimony which the jury had a right to believe and which, if believed, would have necessitated a verdict in Stanton's favor. Unfortunately for Stanton, however, the jury did not believe this testimony and so a verdict against him resulted. Inasmuch as this Court will not sit in review of the jury's findings, it is evident that a statement based upon testimony which was rejected by the jury is utterly valueless for the purpose of informing this Court so it may act

intelligently upon the questions which are open for its consideration. We therefore make a statement of the case which is based upon testimony that the jury accepted and acted upon in returning its verdict in favor of Hample and Hamilton.

Stanton was the president and general manager, the principal shareholder, and the virtual dictator of the E. H. Stanton Company. He and his son were two of its board of four directors, Hample and Hamilton being the other two. Hample and Hamilton resided in Butte and only came to Spokane, where the Stanton plant was located, once or twice a year. For their information concerning the Company's affairs, they depended upon statements and reports from time to time made to them by Stanton (49-50, 102). Prior to May, 1917, Stanton had become very desirious of disposing of his business, principally, it would seem from his statement to Armour & Co. during the negotiations for the sale to that institution, because he had worked hard, desired to take a rest, and had no one to take his place in the management of the Company because his son was not inclined to go on with the business (79). Early in 1917, Stanton gave Wilson & Co. an option on his stock for $200 a share, which option was not exercised (100). On May 8, 1917, he gave an option to a broker, one Grinnell, on 5084¼ shares of the stock at $220 a share, the purpose of such option being to enable Grinnell to try to make a sale of the stock to Armour & Co. (100, 39). That amount of stock represented practically all the issued

stock of the Stanton Company and was more than was owned by Stanton, Hample and Hamilton, the principal shareholders, combined. Grinnell went to Armour & Co. with this option and as a result Armour & Co. sent representatives to Spokane to examine the property. After they had been in Spokane a few days, Stanton went over to Butte to see Hample and Hamilton about selling their stock, this being the first intimation they had that a sale was desired or in contemplation. Stanton told them that the prospective purchaser was Armour & Co., represented that the Stanton Company had a large amount of stock on hand and a poor market for it, that the Government had required the Stanton Company to put in improvements which would cost $150,000 to $200,000 and that if they didn't sell their stock to Armour & Co. that company would put in a competing plant in Spokane and ruin their business. His conclusion was that they ought, by all means, to sell the stock and that he would take $150 a share for his stock if he could not do any better (42, 52-53, 101). Hample and Hamilton thought the price mentioned was too low and said they would not sell without going to Spokane and looking the plant over. Stanton had told them in Butte that he had said to Armour & Co. that he would not sell his own stock unless it took care of Hample and Hamilton, and when they reached Spokane he took them out to the plant, showed them around, and then took them to his house as his guests. He said that Armour & Co. had not made a proposition, that

it only wanted to buy a certain amount of stock, but that he would not sell his stock unless Hample and Hamilton sold theirs. He said he would drive as hard a bargain with Armour & Co. as he could and that whatever he got for his stock Hample and Hamilton would get for theirs. He told them that all their stock ought to be sold together and that he wanted to do the trading and would make the hardest trade he could, repeating that whatever he got for his stock they would get for theirs and that he didn't want to make a cent off of them (43, 53-55).

After looking the plant over, Hample and Hamilton were confirmed in their opinion that the price talked by Stanton in Butte, $150 a share, was too low, and said they would not consider a sale at that price. Stanton then suggested that they might be able to get as much as $175, and said that if he could get $175 for his stock he was ready to sell it. Hample thereupon offered to take his (Stanton's) stock at that figure and pay cash for it, upon which Stanton laughed and said that he might possibly do a little better (43-44). Hample and Hamilton remained in Spokane for several days. They were faithful to their agreement with Stanton to let him do the trading and so did not talk about the deal with the Armour representatives. Stanton continued to talk discouragingly of the value of the property, but represented that he was crowding Armour & Co. up and had got its representatives where he thought they would pay $190. About this time Hamilton said that he would not con-

sider less than $200 a share for his stock and that if Armour & Co. did not want to close on that basis he was going home. Hamilton at that time had gone to the hotel, and he paid his bill, got his grip, and started for home. Stanton, discovering this, was immediately successful in getting the price Armour & Co. was willing to pay raised to $200, and thereupon took Hamilton and Hample to Robbins, vice president and principal representative on the ground of Armour & Co., and told him that they were willing to sell for $200, upon which the deal was immediately closed. They were told not to say anything about having made a sale and left, not knowing until some time after what Stanton was paid for his stock (44-46, 53-56).

The contract by which Stanton sold his stock to Armour & Co. stated a lump price of $576,400 for the 2420⅔ shares of stock owned by him. Figuring Stanton's 2420⅔ shares of stock at $220 a share, the amount is $532,546.66. Twenty dollars a share on Hamilton's 1096⅓ shares amounts to $21,926.67. Hample owned an equal amount of stock. Add the three sums together: $220 a share on Stanton's stock is $532,446.66, plus $21,926.67, represented by $20 a share on Hample's stock, plus $21,926.67, represented by $20 a share on Hamilton's stock, and the result is the lump sum agreed to be paid for the Stanton stock, $576,400. The conclusion is irresistible that Stanton sold his own stock at the price stated in the option, $220 a share, and then procured to be added to it $20 a share on the Hamilton and Hample stock. That

Armour & Co. was entirely willing to pay Stanton $220 a share for all the stock of the Stanton Company he could obtain, no matter what he paid for it, is evidenced by the provision in the sale agreement that Armour & Company would purchase from Stanton any of the stock of the Stanton Company he might be able to obtain, regardless of the purchase price he might pay for it, the offer to remain open for a period of four months (36-38).

There were some collateral agreements inserted in the Stanton sale contract, such as that he would not engage in the meat business in four designated states for a period of ten years, and would guaranty the accounts receivable, etc., and it is contended that the sale price stated in his contract, so far as it exceeded $200 a share for his stock, was paid him for these collateral agreements. The evidence is overwhelming that the pretense that the sum over $200 a share that was paid him for his stock was paid for these incidental agreements is the veriest sham. In any event, it was obviously a question for the jury upon the direct testimony and the inferences reasonably to be drawn from all the evidence as to the true nature of the transaction between Stanton and Armour & Co. The jury found that Stanton not only got $220 a share for his own stock, but he got $20 a share on the Hample and Hamilton stock, for the receipt of which there was no other consideration except that he was successful in getting their stock for Armour & Co.

at $200 a share. The verdict was for this $20 a share on their stock, and it is of this that Stanton complains.

ARGUMENT.

After the jury returned verdicts against Stanton, he became dissatisfied with the attorneys who tried the case for him below and substituted his present counsel for them (159-160). As the argument proceeds it will be observed that there are two vital defects in the positions taken by Stanton's present counsel. The first is that there is nothing to them, as matter of law, and the second is that Stanton's trial counsel did not believe there was anything in any of these positions and therefore did not take them during the trial, so that neither by objection nor exception was any question made in the lower court which is now attempted to be urged in this court.

I.

The principal complaint which is made of the instruction assailed by the first specification of error is that there was no evidence upon which to base it, and that therefore it was necessarily misleading.

An analysis of the issues made by the pleadings shows that the instruction in question was the pivotal one given. Plaintiff's complaint stated a clear-cut cause of action for money had and received. It charged that the defendant procured the plaintiff to permit him (defendant) to make the sale of the plaintiff's stock to Armour & Co. by representing that

plaintiff should receive the same amount for his stock that Stanton received for his; that Stanton made a sale of the stock, plaintiff's as well as his own, to Armour & Co. for $220 a share; that he falsely represented to the plaintiff that the stock had been sold for $200 a share; that plaintiff, in reliance upon such statement and in ignorance of the fact, thereupon sold his stock for $200 a share; that the defendant was paid $220 a share for his own stock and $20 a share upon the number of shares owned by plaintiff, he receiving this latter amount because he had been able to get plaintiff's stock for $200 a share (2-6).

The defendant, both by admissions and denials and affirmative plea, averred the fact to be that he was paid but $200 a share for his stock, and that the additional money paid him was as consideration for the collateral agreements made by him in selling his stock (10-12).

The instruction attacked was to the effect that if the jury found from a preponderance of the testimony that the defendant assumed and agreed to and actually did conduct the negotiations which resulted in the sale of plaintiff's stock to Armour & Co., that the plaintiff had no information concerning the price which Armour & Co. was willing to pay, or which the defendant got for his stock, except such as the defendant gave him, that by reason of defendant's misstatement or concealment the plaintiff was induced to accept $200 a share for his stock, whereupon $20 a share on the number of shares owned by him was

added to the price paid to the defendant for his stock, and that this $20 a share was added to the price paid defendant because Armour & Co. had been able to procure plaintiff's stock for $200 a share, then the amount of money thus received by the defendant, to-wit; $20 a share on the number of shares owned by plaintiff, rightfully belonged to plaintiff, and the jury's verdict should be for him in that amount (128-129).

It is now insisted by Stanton's counsel that the evidence clearly establishes that Stanton was paid but $200 a share for his stock, and that the additional purchase price stated in his contract of sale was paid him in consideration of his collateral agreements that he would not engage in business in four designated states, that he would guaranty the accounts, etc. Supported by wholesale quotations from the testimony, it is argued over thirty or forty pages of the brief that there is neither direct evidence nor any reasonable inference from evidence to sustain the claim that Stanton got more than $200 a share for his stock or received any money on account of the sale of plaintiff's stock, but that it indisputably appears that the transaction was a straightforward, clear-cut sale of Stanton's stock for $200, and that there was added to it the sum of $92,266.67, which was paid him as consideration for his collateral undertakings.

If counsel's claim is sustainable, it is apparent that there was no evidence to go to the jury in support of the plaintiff's case and a verdict in the defendant's favor should have been directed. If it is true that the

evidence establishes without dispute that Stanton received but $200 a share for his stock, the same price that was paid Hample and Hamilton, that he received no part of the purchase price of the Hample and Hamilton stock, and that the additional consideration which was paid him in excess of $200 a share for his stock was *bona fide* paid him as consideration for the collateral undertakings he entered into in selling his stock, then plainly no case of any sort was made against Stanton. Looking to the record, however, it is seen that Stanton's trial counsel took the view that there was evidence to take the case against him to the jury. Neither by motion for non-suit, nor for a directed verdict, nor for a new trial, did they challenge the sufficiency of the evidence. Moreover, they requested an instruction in which the theory of plaintiff's case as outlined in the complaint was stated, and which told the jury that in order for the plaintiff to recover on that theory he must establish by a preponderance of the evidence (a) that the plaintiff authorized the defendant to sell plaintiff's stock and the defendant agreed to sell plaintiff's stock at the same price he sold his own, (b) that defendant did in fact sell plaintiff's stock, (c) that the price Armour & Co. promised to pay for plaintiff's stock was $220 and not $200 per share, (d) that Armour & Co. actually paid for plaintiff's stock $220 per share, of which $20 was paid to defendant, and that if plaintiff had failed to establish by a preponderance of the evidence any of those things, then he could not recover

(120-121). They also requested an instruction in which Stanton's theory of the case was stated, *viz.*, that he had sold his stock for but $200 a share, and that the remaining consideration paid him was in consideration of his collateral undertakings, and that if the jury should find that a part of the consideration named in the contract of sale was paid, or agreed to be paid, to Stanton for his collateral undertakings, and that in fact Stanton sold his own stock for the same price at which plaintiff's stock was sold, then it should find a verdict in the defendant's favor (122-123). These instructions were given either *ipsissimis verbis* or in substance (130-133).

Now it is well settled that though there may be "ground for serious doubt" respecting the sufficiency of the evidence to take a case to the jury, if a directed verdict is not demanded and the defendant assumes that the case will be submitted and asks instructions touching the several points on which it relies, there can be no reversal because the issues of fact were submitted to the jury. *Hartford etc. Ins. Co.* v. *Unsell,* 144 U. S., 439, 451. In the absence of a request for a directed verdict, the appellate court will assume "that there was sufficient evidence to warrant the court in permitting the jury to draw the inferences proper to be deduced from the evidence in the case." *Hansen* v. *Boyd,* 161 U. S., 397, 402. The objection that there was no evidence of the amount of damage caused by breaches of a contract cannot be made for the first time in the appellate court. It is essential to its con-

sideration that the attention of the trial court should have been called to the point and the direction of a verdict requested on that ground. *Mercantile Trust Co.* v. *Hensey,* 205 U. S., 298, 306. A party who has requested an instruction which assumes that there is some evidence as to a certain matter cannot allege error in the giving of another instruction relating to the same matter on the ground that there was no evidence in relation thereto. *Little Rock etc. Co.* v. *Mosley,* 56 Fed., 1009. This Court has held in a criminal case that where the defendant does not move for an instructed verdict, and without objection permits the jury to be charged on the assumption that there is sufficient evidence to justify a submission of the case, the point of insufficiency of the evidence is waived and cannot be considered in the appellate court. *MacDonnell* v. *United States,* 133 Fed., 293. It has also held that a defendant's motion for non-suit is waived by subsequent introduction of evidence and submission of the case without request for a directed verdict. *Alaska etc. Co.* v. *Egan,* 202 Fed., 867. See also *Mining Co.* v. *Hodge,* 213 Fed., 605. The rule stated in the foregoing cases is the universally accepted rule in all the federal courts. *Western etc. Co.* v. *Ingrahn,* 70 Fed., 219, *German Ins. Co.* v. *Frederick,* 58 Fed., 144, *Tabor v. Bank,* 62 Fed., 383, *Atlantic etc. Co.* v. *Thompson,* 211 Fed., 889, *Bidwell* v. *Trading Co.,* 183 Fed., 93, *Chisholm* v. *Brick Co.,* 65 Fed., 1, *Pennsylvania Casualty Co.* v. *Whitney,* 210 Fed., 782.

Counsel may contend that the foregoing citations

are not pertinent because they do not under this head —although they do later—contend there was no evidence to take the case to the jury; they simply insist that the instruction should not have been given because there was no evidence to warrant it. True, such is the form of the attack, but it necessarily goes to the root of the plaintiff's case. The lower court, say they, should not by this instruction have submitted to the jury the question whether Stanton got more than $200 a share for his stock, for there is no evidence that he got more; there should not thereby have been submitted the question whether Stanton got $20 a share on plaintiff's stock, for there is no evidence that he got it. On the contrary, it is vehemently argued, the evidence is undisputed that the transaction was as testified to by Stanton; that he was paid $200 a share for his stock and $92,266.67 for his collateral undertakings.

It is manifest that if such is the state of the evidence the plaintiff has no case. If so it was incumbent upon the defendant to challenge the sufficiency of the evidence below. What he failed to do there he cannot do here, directly or indirectly. In *Hansen v. Boyd,* 161 U. S., 396, which was an action involving alleged wagering deals in grain, certain instructions involving the hypothesis that the transactions were valid were objected to on the ground "that under the evidence in the case the court was not warranted in assuming or the jury in finding * * * that the transactions might be valid." As this objection went to

the root of the plaintiffs' case, and necessarily involved the claim that there was no evidence to sustain it, it was held that the objection could not be considered when the defendant had failed to ask a directed verdict. Much the same condition appears in *Mercantile Trust Co. v. Hensey,* 205 U. S., 298.

Moreover, consistency is required of a litigant, and he is held in the appellate court to the theory upon which he proceeded in the lower court. 3 Corpus Juris, 718. If a fact is admitted, conceded, or assumed without objection in the lower court, it cannot be contested in the appellate court or it be objected that there was no evidence on the question. 3 Corpus Juris, 735 *Texas & Pac. Ry. v. Oil Co.,* 204 U. S., 426. Here Stanton's trial counsel assumed there was evidence to go to the jury to sustain plaintiff's case, for they in no way challenged the sufficiency of the evidence. Furthermore, they requested an instruction which embodied the hypotheses which counsel now say there was no evidence to sustain, and informed the jury that it must find those hypotheses to be established by a preponderance of the evidence else it could not find for plaintiff (120-121), following it up by a request which embodied Stanton's theory of the transaction and advised the jury that if it found that theory to be sustained by the evidence then it must find for the defendant (122-123). Both instructions were given substantially as requested (130-133). Where a defendant not only does not challenge the sufficiency of evidence to take a question of fact

to the jury, but assumes that there is conflicting evidence upon which the evidence is for the jury's consideration, evidenced by requesting instructions presenting its contentions in that behalf, it will not be heard in the appellate court to say there was no evidence on the point. *Hartford etc. Ins. Co. v. Unsell,* 144 U. S., 439, 451, *Little Rock Ry. v. Mosely,* 56 Fed., 1009.

But plainly there was evidence for the jury's consideration on the questions of fact involved. Hample and Hamilton both testified that Stanton urged them to leave to him the negotiations for selling all their stock to Armour & Co., saying that he would drive as hard a bargain with Armour & Co. as he could, would not sell his stock unless he also sold theirs, and that they should receive the same price for their stock that he received for his. They testified that, relying upon this urging and promise, they did leave the matter of negotiations entirely to Stanton, standing firmly on the one point only, that they would not sell for less than $200 (43-45, 53-55). Stanton denies this, but manifestly that question was for the jury. It is equally manifest that the question whether Stanton was paid $220 a share for his stock, plus $20 a share on the Hample and Hamilton stock because he had gotten it for $200, or whether Stanton was paid $200 for his stock, plus $92,266.67 for his collateral agreements, was also for the jury. It certainly seems a remarkable coincidence that a lump price of $576,400 —not $575,000, or $576,000 or $577,000—was fixed

for an odd lot of 2420⅔ shares. As before remarked, taking Stanton's 2420⅔ shares at $220, we have $532,546.66. Adding $21,926.67 for Hample's 1096⅓ shares at $20 a share, and the same sum for Hamilton's 1096⅓ shares at $20 we have the total net sum of $576,400 which was paid for the Stanton stock. Recognizing the impossibility, evidently, of contending that the coincidence of these figures was a mere coincidence, Stanton proffered this explanation: He said that he had agreed to sell his stock for $200 a share, the same price that was to be paid Hample and Hamilton. Then Armour & Co. desired certain collateral undertakings from him; that he would agree not to go into the meat business in four designated states during a period of ten years, to guaranty some accounts receivable, and to give his advice and assistance to Armour & Co. for a short time. Stanton forthwith demanded $100,000 as consideration for entering into these undertakings. Armour's representatives told him, in substance, that they had come to Spokane expecting to buy the stock for $220 a share and that they didn't want to pay any more than that; that they had got his stock and Hample and Hamilton's stock for $200 a share, and they were therefore willing to pay him for these collateral agreements $20 a share on the number of shares owned by him, Hample and Hamilton, as this would simply bring the price paid for this stock up to $220, the option price. This amounted to only $92,266.67, and Stanton stood firm for his stated price of $100,000. Then the Armour people

agreed to give him, in addition, a Packard automobile owned by the Stanton Company, and an agreement that they would take off his hands at $220 a share all the remaining Stanton Company stock he could get without regard to the price he might pay for it, and this offer he accepted.

Ingenuity may be conceded to the explanation, but no reasonable person would believe it. Stanton was not only the largest shareholder in the Stanton Company but was its president and general manager, virtual dictator of its affairs. He made a price upon practically all the outstanding stock of the Stanton Company at $220 a share and the Armour representatives had come out from Chicago to examine the plant at that price. True, he says that after they had examined it, they said they would not take it at $220 a share, but the fact that they did pay that and more for the stock proves that he prevaricated in that as he did in so many other things during the progress of the trial. Now, Armour & Co. could not get the stock of the Stanton Company unless they dealt with Stanton. He owned, if not the controlling interest, at least sufficiently near it so that he, standing alone, could block their efforts to obtain control of the property. If he spoke enthusiastically of the value of the property and urged the shareholders not to sell unless at some very high price, it is clear that he could have blocked the sale. Now what do we find him doing? After the representatives of Armour & Co. had been in Spokane a few days he went to Butte to see Hample

and Hamilton, next to him the largest shareholders in the Stanton Company, and whose shares, together with his own, would have given Armour & Co. 4613⅓ shares out of a total of 5669⅔ shares issued. Self-confessedly, he went to Butte to endeavor to get Hample and Hamilton to sell their stock. Self-confessedly, he strongly urged them to make the sale, saying that the Government had ordered improvements which would cost $150,000 to $200,000, that the business generally was not in a very good way and that if Armour & Co. did not get the stock of the Stanton Company it would start an independent plant which would seriously injure the Stanton Company. Self-confessedly, he talked to them a sale at $150 a share if more could not be obtained, saying that he would take that for his stock rather than not sell. When Hample and Hamilton refused to sell their stock at $150 a share they came to Spokane to look over the situation personally. He met them when they came with the plea that he should be permitted to manage the negotiations for the sale, promising to make the best deal he could and that they should receive for their stock whatever price he got for his. He then went through the farce of pretended negotiations, telling them how strongly he was contending with Armour & Co. for a higher price and how serious the contest was. He talked to them first $175 a share, then $184, and then $190, and only brought Armour & Co. to $200 a share when Hamilton said he would take no less and that if Armour & Co. did not want

his stock at that price he was going home, and then started. It is self-evident that Armour & Co. never refused to pay $220 a share for the Stanton Company stock and were never haggling for $150, $175, then $190 a share, as Stanton contended. Armour's representatives had come out from Chicago with the at least *prima facie* belief that the stock was worth $220 a share. They paid $220 a share for the Stanton, Hample and Hamilton stock, albeit Hample and Hamilton got but $200 a share for their stock, the remaining $20 a share on their stock going into Stanton's pocket. In the agreement for purchase of the Stanton stock, Armour & Co. agreed to pay him $220 for all the rest of the Stanton stock he could pick up, no matter what price he paid for it. Stanton, under this agreement, sold the Armstrong stock to Armour & Co. (73), and Armour & Co. independently bought 100 shares of the stock from William Huntley for $220 (71), and 100 shares from F. M. Rothrock for $250 (72), afterwards compensating themselves for the excess price by buying a little of the stock for $200 a share (111). The thing speaks for itself. Armour & Co. was prepared to pay $220 for the Stanton stock and Stanton knew it was. No child but would have been aware that it was willing to pay that sum. Armour & Co. was obliged to have Stanton's co-operation in getting the stock and so they made the deal with him that is evidenced in the sale contract: that they would take any stock he could get hold of and pay him $220 for it regardless of the

price he might pay therefor. True, this agreement was not yet in writing when Stanton went to Butte, but that the promise had been made is beyond question. Though the Armour representatives had come out from Chicago on a quoted price of $220 a share and the negotiations for the purchase of the stock were still forward, Stanton went to Butte and urged strongly upon Hample and Hamilton that they sell their stock for $150 a share. These men were old friends of his. They had known him for thirty-five years. They had come to his assistance financially when the affairs of his company were in a bad way. While not testified to directly, it is apparent that they had great confidence in him, else they would not have entrusted to him the negotiations for the sale of their stock. There could have been no purpose in Stanton endeavoring, without profit to himself, to defraud these men in favor of Armour & Co. by getting them to sell their stock for less than Armour & Co. was willing to pay. The sole explanation of his efforts, both in Butte and Spokane, to get them to sell their stock for $150, then, when they declined to take that, raising the price to $175, then to $190, and finally telling them that Armour & Co. would pay $200 only when Hamilton was preparing to leave for home, is explainable in only one way: that Armour & Co. had then promised him orally, as it thereafter did in writing, to pay to him $220 a share for all the stock of the Stanton Company he could get regardless of the price he paid therefor. Of course if he could have

gotten the stock for $150 a share, so much the greater his profit. But he would pay $200 for it rather than risk the loss of a sale, for even that, it must be conceded, was a very nice little profit for this kindly president of a corporation to make out of his confiding shareholders.

As heretofore suggested, Stanton must have known from the attitude of the Armour representatives that they were willing to pay $220 a share for the stock. They had come out from Chicago to negotiate for the purchase at that quoted price. Stanton says that after they looked over the plant they came to him and said they were not interested in the option; that the stock was not worth $220 a share and they thought there was no need of further investigation, saying that they were going on to Seattle, intimating that they expected to look over the Frye plant at that place (101). In this Stanton is contradicted by the Armour representatives. O'Hern testified that after they had been looking over the plant for two or three days Stanton was told they were not in position to pay cash for the plant and that there would have to be a guaranty of the accounts and suggested that an inventory be made and the stock taken at an inventory value. Conferences continued between them, and then Stanton went over to Butte to see Hample and Hamilon. When Hample and Hamilton came back, negotiations were started on the part of the sellers at $250 a share, whereupon O'Hern told them that Armour & Co. had an option at $220. They finally came down to about $220, and

O'Hern said he would take the matter up further with Mr. Robbins (73-76). Robbins testified that the maximum that he wanted to pay for the stock as a whole was $220 a share, that the people at home had that figure fixed in their minds and that he would have let the trade drop rather than to pay any more than that for the stock, and that when Stanton wanted $100,000 "more or less" for his collateral undertakings he (Robbins) told Stanton that he would not pay over $220 on the average for the stock (98-99). When it came to finally dealing with Stanton for the purchase of the stock, Armour & Co. agreed to pay him $220 for all the Stanton Company stock he could pick up, regardless of what he paid for it. It is obvious that Stanton must have known of the willingness of Armour & Co. to pay up to $220 for the stock, and it is obvious that he would not have sold out what was practically the controlling interest in the company for a much smaller sum than Armour & Co. was willing to pay for small lots.

Again, Stanton says that he agreed to sell his stock for $200 a share, but that Armour & Co. then asked these collateral undertakings and he balked unless they were willing to pay him $100,000 therefor. They turned and twisted and wriggled, but finally got their offer up to what he estimated would be approximately $100,000, and he then accepted it. He makes it plain, however, that while he would have sold his stock for $200 a share, he positively would not enter into the collateral undertakings unless he received approxi-

mately $100,000 over and above the $200 a share. Now Stanton admits that when he went to Butte he strongly urged Hample and Hamilton to sell their stock for $150 a share if they could not get more, telling them that he was willing to sell his stock for that if they could not get more, and he says upon his representations they finally agreed with him to take $150 if a higher price could not be obtained. Fifty dollars a share on Stanton's 2420⅔ shares is over $120,000. It would seem that when Stanton had gotten Armour & Co. up to $200 a share for his stock, which was more than $120,000 in excess of what he would have been willing to sell for if necessary, he would not have haggled over entering into the collateral agreements they requested and demanded as a *sine qua non* that they pay him an additional $100,000.

Still another consideration. In arguing Stanton's unwillingness to enter into these collateral agreements unless the further sum of $100,000 was paid him over and above the $200 for his stock, which consideration is based upon Stanton's agreement not to enter the meat business in four designated states for a period of ten years, it is urged that this was a very valuable agreement for which he should have been well paid. O'Hern says, however, that when these collateral undertakings were suggested to Stanton he (Stanton) made not the slightest difficulty about agreeing not to go into the business in the four designated states, saying that he wanted to get out of the business, that he

needed a rest, and his son would not take it up and that he was therefore quite willing to guaranty that he would stay out of the business (79).

Next it is urged against the instruction under consideration that it authorizes a recovery against Stanton of $20 a share on the stock owned by Hample and Hamilton, and that this was erroneous because Stanton had paid, or was obligated to pay, a commission of two per cent. to Grinnell for selling the stock, and the amount of this commission should have been deducted from the recovery because Stanton did not really receive $20 a share on Hample's and Hamilton's stock, but $20 a share less two per cent. as the commission for selling it.

This is another of the notions utterly unsupported by evidence and flatly in conflict with the theory upon which Stanton's case was tried below which the exigencies of the situation have evolved from the fertile brains of Stanton's present counsel. They say that the very foundation of this action was the option given by Stanton to Grinnell (Brief p. 47). It is true a writing was put in evidence whereby Stanton agreed to pay Grinnell a commission of two per cent. if within fifteen days he produced a purchaser who could and would pay $220 a share in cash for the stock (39). But it is, of course, among the fundamentals of the law that a broker is not entitled to a commission unless he produces a purchaser ready,

able and willing to purchase upon the terms on which the vendor has agreed to sell. It is conceded that there was a departure from the terms of the Grinnell option in that Armour & Co. did not pay cash for the stock, only a comparatively small sum being paid in cash, the remainder being paid at varying intervals. Moreover, it was Stanton's prime contention through the trial of this case that Armour & Co. paid but $200 a share for his stock and for Hample's and Hamilton's stock. He so pleaded in the affirmative defense set out in his answer (12), he so testified (103-105), he requested an instruction to the jury in which that view was embodied (122-123), and the requested instruction was given (131-133). True, Stanton might have waived the terms of sale and the price stated in the Grinnell option, or might by some modified agreement have rendered himself liable to pay a commission to Grinnell, although Grinnell did not produce a purchaser under the terms of the original option. It is certain, however, that Stanton denies any waiver of the terms or price stated in the Grinnell option and denies any liability to pay Grinnell a commission. It is true that Grinnell seemingly takes a different view of the situation, for there was read in evidence in this case a portion of Stanton's cross examination in an action brought against him by Grinnell to recover a commission (32-36) in which Stanton took the same position that he is taking in this case, *viz.*, that no sale was made to Armour & Co. under the terms of the Grinnell option, but that he, Hample and Hamilton were paid but $200 a share

for their stock, the greater consideration paid Stanton being for his agreements collateral to the sale. In conformity with Stanton's position in the Grinnell action as well as in this, his counsel in this case requested an instruction that the so-called Grinnell option was without consideration, that Stanton could rescind it at any time, and that it was not binding upon him unless Grinnell produced a purchaser under it (124). This instruction was given with the addendum that the jury was not to consider the option for any purpose except so far as it might assist in determining what the consideration for the sale of the stock actually was (134).

Counsel devote much of their opening brief to an argument that it was error to give an instruction which there is no evidence to support, a contention with which any lawyer would agree as of course. Adopting their argument and applying it to the particular contention under discussion, it would have been clear error to submit to the jury the question of whether Stanton had paid, or was liable to pay, Grinnell any commission, and, if so, what the amount was and whether it ought to be deducted from any recovery awarded against Stanton. There is not an atom of evidence that Stanton waived the terms of purchase stated in the Grinnell option, there is not an atom of evidence that Grinnell became entitled to any commission under the option, and there is not an atom of evidence that Stanton has paid Grinnell any commission, or admitted liability to pay any commission,

or that any liability to pay a commission has been established against him. Giving effect not only to the direct evidence but to every reasonable inference which can be drawn from the evidence, no more appears than that Grinnell was employed to find a purchaser for the stock at a stated price and upon stated terms, that he did not procure a purchaser at the terms stated, the customer he produced buying upon other terms, that Stanton claims there was not only a deviation from the terms of the purchase but from the price fixed in the option, and that litigation is in progress between Stanton and Grinnell over the question of whether Grinnell earned a commission. The contention that there should have been submitted to the jury the question of whether Stanton had paid or was liable to pay Grinnell any commission, and, if so, the amount thereof, and whether it should have been deducted from the amount of the recovery, is patently absurd.

Moreover, the authorities heretofore cited establish beyond dispute that a party must adhere in the appellate court to the position he took in the lower court. Stanton's position in the lower court was that Grinnell's customer not only did not pay cash but that it paid only $200 a share. If that were so Grinnell earned no commission unless there was a new or modified agreement made with him, a situation nowhere suggested. Stanton's trial counsel, proceeding agreeably to Stanton's contention, requested and procured an instruction to the effect that the option was

not binding upon him and that the jury should only consider it so far as might aid in determining the actual consideration for the sale of the stock. In flat contradiction of that position Stanton's present counsel come into this Court and say that the very foundation of the action is the Grinnell option, and that the jury ought to have given it effect, or have been permitted to give it effect, by deducting from the amount of any recovery from Stanton the commission stipulated in the option. If the use which they request this Court to make of the option is not in the teeth of the use which Stanton's counsel procured the court to instruct the jury could be made of it, there is no understanding the meaning of the English language.

A further and equally conclusive reason why there was no error in the instruction under discussion is that it is a correct statement of the law according to the theory of the evidence maintained by the plaintiff, and if there was any other view that could be taken of the evidence, any view which is in accord with counsel's contention in this Court, it was the duty of counsel to request an instruction concerning that view of the trial court. Wanting such request, error cannot be based upon the omission to instruct upon the view now advanced.

It is the law, of course, that in an action for money had and received plaintiff can only recover such sum as in equity belongs to him, and if equity requires that Hample and Hamilton should pay any commission which it may be assumed Grinnell is in position

to collect from Stanton rather than that Stanton should be compelled to pay it, then the amount of such commission, whatever it may be assumed to be, should be deducted from the recovery. It is too plain for discussion, however, that Hample and Hamilton ought not to be charged with the payment of a commission to Grinnell if it is assumed that any is to be paid him. They did not employ him to sell their stock nor authorize Stanton to do so. They did not wish to sell and only did so at Stanton's urgent solicitation. Grinnell was merely an instrument, albeit an innocent one, in Stanton's scheme for gulling them. Assuredly equity does not demand that a person suing to recover money of which he has been cozened shall pay the expenses incurred by the cozener in perpetrating the deceit.

Moreover, the first intimation that Hample and Hamilton had of Grinnell's connection with the sale was the night before the sale was closed, when Stanton told them casually that Grinnell was claiming a commission, but that it did not amount to anything and he would take care of it, having planned to do so out of his $25,000 note which they had cancelled and the automobile which they had given him at his request (48-49, 55-56).

In this state of the evidence, the utmost that counsel can claim is that there were two views of the transaction which might have been submitted to the jury. The first would be that Grinnell's claim was not a factor in the controversy between Hample and

Hamilton and Stanton, and that if they were entitled to recover anything from Stanton they were entitled to recover the full amount of their money which he had obtained, regardless of any claim Grinnell might have against him growing out of the transaction by which it was obtained. This was the view embodied in the instruction complained of. The second view would be that there was evidence from which the jury might say that Stanton had paid, or would be liable to pay, Grinnell a commission in some assumed amount for selling the stock, and that in equity and good conscience any such amount ought to be taken out of the money of Hample and Hamilton that Stanton had in his possession. Under the most fundamental rules of appellate procedure, the omission to state this second theory of the evidence to the jury cannot be complained of in this court because there was no request in the trial court for an instruction presenting it. On the contrary, it is assumed in all the instructions requested in Stanton's behalf that if there could be any recovery at all against him it must be for the $20 a share upon their stock which Hample and Hamilton claimed he had obtained, and Stanton's counsel requested and secured an instruction eliminating the Grinnell option from consideration except for the purpose of aiding the jury in determining what was actually paid for the stock (120-124). It is no ground for reversal, says the Supreme Court, that a trial court omitted to give directions to the jury upon points of law which might arise in the cause when not requested to do so by either party, for it is sufficient

for the appellate court that no erroneous instructions were given. If either party deems any point presented by the evidence to be omitted from the charge, he must require an opinion from the court upon that point and if he do not do so there is a waiver of it. *Pennock v. Dialogue,* 2 Peters 1, 15. If a charge does not go far enough it is the privilege of counsel to call attention to any omission and request an instruction upon it, and if such request is made and refused and an exception saved, the appellate court will consider whether there was error in the refusal.

> "But the mere omission to charge the jury on some one of the points in a case when it does not appear that the party feeling himself aggrieved made any request to the court on the subject cannot be assigned for error."
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> *Express Co. v. Kountze Bros.,* 8 Wallace, 342, 354.

In a criminal case it was objected that it was error to charge that the *corpus delicti* could be established by circumstantial evidence without saying that such evidence should have been sufficient to create cogent, irresistible grounds of presumption. The Supreme Court said that without any request on the part of the defendant to add the qualification suggested there was no error in the charge actually given, for it is no ground of reversal for a court to omit to give instructions which are not requested by the defendant. *Isaacs v. United States,* 159 U. S., 487, 491.

So where there were several pleas filed by the defendant, error cannot be assigned upon the failure of

the court to charge upon the issue raised by one of them where it does not appear that the court was requested to charge upon that issue. *Carter v. Carusi,* 112 U. S., 471, 484.

In the late case of *Illinois Central Ry. v. Skaggs,* 240 U. S., 66, 72, it was said that if a plaintiff in error "desired any addition, amplification or qualification (to an instruction) in order to present its point of view to the jury, it should have made appropriate requests therefor," and in the absence of such a request error assigned upon the instruction would not be considered. See also *Phoenix Ry. v. Landis,* 231 U. S., 578.

This Court has held that it would not consider error assigned upon an instruction respecting adverse possession, the claim of error being that the term "adverse possession" was not correctly defined in that it did not include all the elements thereof, when no instruction including such elements was requested. *Eastern Oregon Land Co. v. Cole,* 92 Fed., 949. See also *Western etc. Land Co. v. Scaife,* 80 Fed., 353.

This Court has also held that the claim that a servant was injured when violating a statute cannot be considered when such claim was not brought to the attention of the trial court by a request for an instruction or in any other manner. *Federal etc. Co. v. Hodge,* 213 Fed., 605.

Turning to the decisions of other Federal Courts, it is held that a defendant cannot complain of the trial

court's omission to instruct the jury as to the measure of damages when it has failed to request a proper charge on the point. *Texas etc. v. Cody,* 67 Fed., 71. In an action to recover for the death of a wife, the omission of the court to charge that in assessing damages the cost of the wife's maintenance during the probable life expectancy should be deducted from the total damages awarded is not error when no request for such an instruction was made. *Grand Trunk Ry. v. Gilpin,* 208 Fed., 126. When the lower court instructed the jury that certain evidence might be considered in mitigation of damages, his omission to state that it could be considered only for such purpose cannot be assigned as error when no instruction to that effect was requested. *Young v. Corrigan,* 210 Fed., 442. Error cannot be predicated upon an omission to instruct on a point in issue when no instruction thereon was requested. *Stephenson v. Atlantic etc. Co.,* 230 Fed., 14. When no instruction is requested on a particular defensive theory, the failure of the court to instruct thereon is not reversible error. *Waters v. Guyle,* 234 Fed., 532.

Next it is urged, in effect, that the jury should have been instructed to take into consideration in determining the amount of the plaintiff's recovery the individual contributions made by Stanton to the subject of sale which, say counsel, induced the payment of the purchase price of $220 a share, such as his agreement to stay out of the meat business in four states, his

guaranty of accounts, etc.

The same considerations control this contention which control the contention just preceding it. The evidence bearing upon Stanton's claim that the sum which was paid him over and above $200 a share was paid in consideration of those collateral undertakings was not introduced for the purpose of minimizing the recoveries of Hample and Hamilton in case the jury found in their favor, but as a complete refutation of their theory to recover, *viz.*, that $220 a share was in fact paid for all their stock but that by deceit Stanton had diverted $20 a share on their stock to his own pockets. That such was the purpose, and the sole purpose, of the evidence introduced by him is made clear by his answer and by the whole course of the evidence. It is put beyond peradventure by the instructions requested by Stanton's counsel, which state first the essential facts which the plaintiff was bound to establish by a preponderance of the evidence in order to recover (120-121), and which then state in opposition the defendant's contention and the use, if believed, which the jury should make of the evidence that Stanton was paid but $200 a share for his stock and that the additional $92,000-odd that was paid him was for his collateral undertakings (122-123). From first to last, in pleadings, evidence, and requested instructions, there is no suggestion from Stanton that the state of facts for which he contended could or should be used in any way to minimize the recovery against him in the event that the jury found in the plaintiff's favor.

His whole contention was that the state of facts to which he testified was a complete defense to the action and prevented any recovery whatsoever. It would be an outrage upon the principles of fair dealing and common decency toward the trial court and the opposing party which have induced the rules of appellate practice that a party must adhere in the appellate court to the theory he proceeded upon below and will not be heard to urge in the higher court a point he did not suggest in the lower court, if Stanton's present counsel should now be heard to urge that the lower court should have instructed the jury, notwithstanding no request for such an instruction was made, that it ought to minimize the amount of any recovery awarded the plaintiff by the amount that it should find Stanton's collateral undertakings had to do in the fixing of the purchase price.

Finally it is urged against the instruction that it combines three different theories of recovery, *viz.*: that plaintiff was entitled to recover on the theory that Stanton was his agent, on the theory that Stanton committed a fraud upon him, and on the theory that there was an implied contract, under the doctrine controlling an action for money had and received, that Stanton should pay him the amount demanded. The contention is palpably absurd. The instruction states nothing but the essentials of a cause of action for money had and received. The pivotal point which was by the instruction submitted for the jury's de-

cision was whether Stanton had received $20 a share on the plaintiff's stock which ought rightfully to have been paid to plaintiff. Of course factors facilitating that result, such as that Stanton was enabled to get the plaintiff's money by inducing plaintiff to let him (Stanton) negotiate the sale to Armour & Co. and then representing to plaintiff that but $200 could be gotten for the stock, all of which factors are covered by pleading and evidence, were referred to in the instruction. It is arrant nonsense, however, to say that a cause of action to recover money rightfully belonging to plaintiff which the defendant had obtained without the plaintiff's consent becomes something else than a cause of action for money had and received because the defendant was enabled to get the money without the plaintiff's consent by violation of a duty which he owed to plaintiff and by a fraud practiced upon him. The plaintiff has pleaded and proved a cause for money had and received, and it is such and not something different, or a combination of that and something else, because it was through trickery and deceit that the defendant was enabled to get his hands on the money.

As counsel enlarge and make much of this theory later on we shall reserve for that head fuller discussion of it.

II.

Counsel have isolated parts of three different instructions, and of these make complaint under their second head. This practice of attempting to elude consideration of the instructions as a whole and to assign error upon isolated portions is, it must be conceded, ancient, although it has not become honorable with age. While even the isolated scraps complained of are not objectionable, in fairness their relation to the remainder of the instructions should be established before entering on their discussion, and to that preliminary task we now address ourselves.

After fully stating the issues made by the pleadings, the lower court instructed the jury that the burden was upon plaintiff to prove every fact material to a recovery by a fair preponderance of the testimony; that if it found from a preponderance of the testimony that the defendant agreed to and did conduct the negotiations which resulted in the sale of the plaintiff's stock to Armour & Co., that the plaintiff had no information concerning the price which Armour & Co. was willing to pay or the defendant was to get for his stock except such as the defendant gave him, that by reason of the defendant's misstatements or concealment the plaintiff was induced to accept $200 a share for his stock, whereupon $20 a share on the number of shares owned by him was, without his knowledge or consent, added to the price paid defendant for his stock, and that the $20 a share on plain-

tiff's stock was added to the price paid the defendant for his stock because Armour & Co. had been able to get the plaintiff's stock for $200, then their verdict should be for plaintiff. On the other hand, the jury was told, the plaintiff could not recover if the jury found that he fixed his own price and conducted his own negotiations for the sale of his stock, even though defendant received a larger price for his stock, unless it found from a preponderance of the testimony that a part of the consideration paid for the plaintiff's stock was actually paid to and received by the defendant and is still retained by him; in the latter event the plaintiff was entitled to recover regardless of the question of agency (129-130). The latter part of this instruction is complained of by the second specification of error.

The court then took up and gave the defendant's first requested instruction (120-121), by which the jury was instructed that plaintiff's theory of the case was that the plaintiff authorized the defendant to sell his (plaintiff's) stock at the same price the defendant should sell his stock; that the defendant falsely represented that the selling price was $200, in reliance upon which the plaintiff sold his stock for that price, when in fact the defendant obtained from Armour & Co. $220 a share on the sale of the plaintiff's stock; that for the plaintiff to recover on that theory he was required to establish by a preponderance of the evidence: (a) That the plaintiff authorized the sale of, and the defendant agreed to sell, the plaintiff's stock at the

same price the defendant received for his; (b) That the defendant sold the plaintiff's stock or induced the plaintiff to sell it; (c) That Armour & Co. agreed to pay $220 a share for the plaintiff's stock; (d) That Armour & Co. actually paid or agreed to pay $220 for plaintiff's stock, paying or agreeing to pay $20 thereof to the defendant; (e) That if the defendant had failed to establish any one of these propositions by a preponderance of the evidence he could not recover on that theory (130). So far the instruction was as requested by the defendant. The court added this proviso: that if it appeared from a preponderance of the evidence that a part of the consideration for the sale of the plaintiff's stock was in fact paid or agreed to be paid to the defendant by Armour & Co., the plaintiff could recover so much of the sum so paid as was still retained by the defendant (131). It is this proviso of which the defendant complains by his third specification of error.

Still following the defendant's requested instructions (121-122), the jury was next instructed that if the defendant did not sell the plaintiff's stock, but that plaintiff sold his own stock and fixed its selling price at $200, he could not recover (131). To this was added the proviso that there could be no recovery "unless, as already stated, you find from a preponderance of the testimony" that a part of the consideration for the sale of the plaintiff's stock was actually paid to the defendant and retained by him. This proviso is complained of by the fourth specification of error.

Immediately succeeding the foregoing, the defendant's third requested instruction (122-123) was given. By this all the elements of Stanton's contention were fully stated: that he sold no stock but that of himself and family, and for it received but $200 a share, the remainder of the consideration paid him being for his collateral undertakings; and the jury was told that if it found such to be the case, then it must find as a fact that Stanton sold his stock for the same price at which the plaintiff's stock was sold, and that the plaintiff could not recover although it appeared that the defendant did in fact sell the plaintiff's stock; that if the $92,-266.66 which was paid the defendant in excess of the price of $200 a share for his stock was actually paid him as a consideration for his collateral undertakings and not as a part of the purchase price of his, Hample's and Hamilton's stock, the plaintiff could not recover; that it was immaterial how the sum of $92,-266.66 was arrived at, whether by taking the total number of shares owned by the defendant, Hample and Hamilton, and multiplying it by $20, or otherwise; that if in fact that sum was paid him as the consideration for his collateral undertakings, and not as a part of the purchase price of his stock and Hample's and Hamilton's stock, the plaintiff could not recover (131-133).

Reading these instructions as a whole, it appears so clearly that even the dullest mind could not misunderstand that these three propositions were stated to the jury:

(1) That plaintiff was entitled to recover if the defendant conducted the negotiations for the sale of the plaintiff's stock, and by defendant's deceit the plaintiff was induced to accept $200 a share for his stock, whereupon $20 a share on the stock owned by him was added to the price paid defendant for his stock; this being because Armour & Co. had been able to get plaintiff's stock for $200 instead of paying the $220 therefor that it was willing to pay.

(2) That plaintiff was not entitled to recover if he conducted his own negotiations for selling and fixed the selling price of his stock, even though defendant received a greater price for his stock, unless the jury found that a part of the consideration for the sale of plaintiff's stock was actually paid to, received, and retained by defendant.

(3) That plaintiff was not entitled to recover although it appeared that the defendant did in fact sell plaintiff's stock if defendant received no part of the purchase price of plaintiff's stock and sold his own stock for $200 a share, the same price that plaintiff received for his; the remainder of the consideration paid defendant being for his collateral undertakings.

The law applicable to the issues and evidence involved is fully covered by these three propositions, and it is stated without tautology or redundancy. The first proposition covered all for which the plaintiff contended by pleading and evidence. It is that if defendant undertook to sell the plaintiff's stock and by

deceit induced plaintiff to sell it for $200, and that because of defendant's success in getting it for $200 Armour & Co. paid defendant $20 a share on the number of shares owned by plaintiff, then defendant had money rightfully belonging to plaintiff which ought in equity and good conscience to be paid plaintiff. Manifestly a case of deceit in a confidential relation is stated, and manifestly a court of equity would not allow the defendant to retain money so obtained. But the plaintiff was not obliged to go into equity to secure relief from the wrong done him.

> "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received."
>
> *Gaines* v. *Miller,* 111 U. S. 395, 397.

> "This action was properly brought for money had and received. This action lies in all cases for the plaintiff's money in the hand of defendant, which in equity and good conscience he has no right to obtain, and it is necessary for the plaintiff to prove only two things—his right to the money, and the defendant's possession. 'Whenever the plaintiff could recover in a court of equity, he can recover in an action for money had and received.' Chitty on Contracts, 474; 2 Tr. 163; 1 Cowper, Rep. 372; Smith v. Bell, 6 Pet. (U. S.), 68, 8 L. Ed., 322."
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> *Rhodes* v. *Jenkins,* (Ga.), 58 S. E., 897, 898.

An agent entrusted with the sale of land represented to his principal that it could only be sold for a stated price, and obtained a conveyance to himself in order to consummate the sale. Subsequently he sold

the land to another at a price in excess of that paid his principal. Held, that while the confidential relation and fraud involved might well give a court of equity jurisdiction to grant relief, the defrauded principal was not obliged to seek relief there but could sue in assumpsit for money had and received; that the same facts which would entitle him to relief in a court of equity entitled him to relief at law.

> "We understand the law to be well settled, that the action of *assumpsit* for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action."
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> *Moore* v. *Mandlebaum,* 8 Mich., 432, 447.

Several persons associated themeslves together for the purpose of buying a mine, each contributing a stated sum to the purchase price. The purchase was entrusted to two of their number, who made a secret profit in completing the purchase. Held, that a joint action in assumpsit by the defrauded partners would lie against those making the secret profit.

> "This was assumpsit for money had and received, and we think the action was properly brought. Under the findings of the jury, the de-

> fendants unlawfully and fraudulently received the money of the plaintiffs, and hence have no right to retain it. The plaintiffs, waiving the tort, brought this action to recover the money of which they had been fraudulently deprived. The action lies on the implied promise to repay the sum unlawfully withheld. Mr. Greenleaf (2 Greenl. Ev. p. 102) says: 'Where the defendant is proved to have in his hand the money of the plaintiff, which aequo et bono he ought to refund, the law conclusively presumes that he has promised so to do, and the jury are bound to find accordingly; and after verdict the promise is presumed to have been actually proved."
>
> *Humbird* v. *Davis* (Pa.), 59 Atl., 1082, 1085.

The authorities leave no manner of doubt that where through fraud, duress, extortion, or imposition of any sort, one person has obtained money which *ex aequo et bono* belongs to another, it may be recovered by an action for money had and received. *Bither* v. *Packard* (Me.), 98 Atl., 929, *Young* v. *Taylor,* 36 Mich., 25, *Williams* v. *Smith* (R. I.), 72 Atl., 1093, *Sarasohn* v. *Miles,* 65 N. Y. Supp. 108 (Affd. 61 N. E., 1134), *Heywood* v. *Assur. Co.* (Minn.), 158 N. W., 632, *Dobson* v. *Winner,* 26 Mo. App., 329.

The first proposition submitted to the jury, then, was whether Stanton made use of his position as agent for the sale of Hample's and Hamilton's stock to deceive them and get $20 a share on their stock which ought rightfully to have been paid them. The above authorities make it manifest that if he did the jury was required to find for them. However, they

would equally be entitled to recover although the jury found against the fact of agency if in fact Stanton got money belonging to them and to which he had no shadow of right. Of course if he did in fact receive but $200 a share for his stock, the same price that was paid Hample and Hamilton for their stock, and the remaining $92,266.66 which was paid him was a *bona fide* consideration for his collateral undertakings, it is clear he got no money which belonged to them and the jury should have found in his favor. And so the jury was told, clearly and emphatically (131-133). But it is equally clear that when one person has received money which actually belongs to another without such other's consent and without giving any valid consideration therefor, the money can be recovered by an action for money had and received. 27 Cyc., 860. That is all there was to the criticized instructions; the jury was told that if it found from a preponderance of the testimony "that a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him" then it should find for the plaintiff "regardless of the question of agency" (129-130). Manifestly that instruction, even though it stood alone and was not to be read as a part of the entire instructions, was a sound statement of the law. As we shall hereinafter demonstrate by reference to many authorities, whenever one man has another's money which he has obtained and retains without right, he can be forced to disgorge by this sort of an action. It is true that if the criticized in-

structions stood alone, and were not supplemented by the other instructions, they are not so complete as they might have been made or, probably, as the trial judge would have made them if he had given no other instructions touching the evidence necessary to sustain the action. As has been seen, however, complaint cannot be made of an instruction which is sound so far as it goes because it is not so complete as it might have been made. Omission in instructions can only be complained of where a proper request to make them more complete is made, refused, and an exception taken. See authorities cited, *supra*. We repeat that the law is clear that when one man gets and retains another man's money without right, an action of this character will lie. That is the primary rule of the law and that primary rule was stated in the criticized instructions. If, as said by the Supreme Court in *Ry. Co.* v. *Skaggs*, 240 U. S., 66, 72, the plaintiff in error "desired any addition, amplification or qualification" to or of the instruction, appropriate requests therefor should have been made.

At any rate, the undisputed facts in this case are such as to make the instructions in question peculiarly sound. If a part of the consideration for the sale of the Hample and Hamilton stock was in fact paid to and retained by Stanton, his relation to them, and his concealment of matters vitally affecting the transaction, were such that he could not in equity and good conscience keep it. And this is so, be it most emphatically remarked, although he was not authorized by

them to sell their stock, and although he may have made no outright misrepresentations to them. Stanton was the largest shareholder in and the president, general manager and virtual dictator of the Stanton Company. He had, as his counsel say in their brief (p. 79) "nearly exclusive control of the conduct of the business." The plant was located at Spokane and Hample and Hamilton lived at Butte. Stanton himself says they "had nothing to do with the management of the business. They came over to Spokane from time to time and I would tell them as near as I could all about everything and all about the business" (100). Their testimony indicates even a slighter knowledge of the business and the value of the property than does Stanton's (49, 51, 66-67). It is generally accepted that the mere fact that a person is a director of a corporation imposes no fiducial obligation upon him in dealing with a shareholder concerning the latter's stock. But few special facts are needed, however, to create a fiducial obligation in such a case. Those facts are present here. Hample and Hamilton had known Stanton for more than 30 years. They had long been shareholders in the Stanton Company. Stanton knew the business and its value intimately, thoroughly; they knew nothing of either except what he told them. When the prospect of a sale to Armour & Co. came up he went to Butte to endeavor to induce them to sell. He himself says that he strongly urged them to sell; told them conditions were unsettled; that they had a lot of frozen meat on hand; that livestock was going higher; that many repairs had to be made,

which would cost at least $150,000; that Armour & Co. was obliged to have a plant in the Northwest and if it did not get the Stanton plant would probably build one of its own at Spokane; that if it did build there it would be a hard competitor and business would be much harder. As a result of his urgings (he says) it was decided they would all sell for $150 if they could not get more (101-102). Now, whatever the rule when no special facts are present, it is well settled that when the dominant officer in a corporation, one in control of its affairs and knowing the value of its property and the consequent value of its stock as its shareholders do not, uses his knowledge and the influence due to his position to purchase or induce the sale of the stock of shareholders, he occupies a fiduciary relation to them, and in his efforts to induce a sale he must neither misstate nor conceal any fact which would affect the price which they could or ought to get for their stock. If he does, the sale should be set aside. *Strong* v. *Repide*, 213 U. S., 419, 431-434, *Oliver* v. *Oliver* (Ga.), 45 S. E., 232, *Stewart* v. *Harris* (Kan.), 77 Pac., 277, *Commonwealth etc.* v. *Seltzer* (Pa.), 76 Atl., 77, *George* v. *Ford*, 36 App. D. C., 315, *Black* v. *Simpson* (S. C.), 77 S. E., 1023, *Fisher* v. *Budlong*, 10 R. I., 525, *Hume* v. *Steele* (Tex.), 59 S. W., 812. In the case at bar, there is, in conjunction with the undisputed evidence as to Stanton's influential position in the Stanton Company and knowledge of its affairs and the extraordinary effort he made to induce Hample and Hamilton to sell their stock, evidence for the jury (heretofore re-

ferred to in detail and therefore merely sketched in here) that the Armour representatives came to Spokane expecting that they would need to pay $220 for the stock if they got it; that after examining the plant they were willing to pay that price for the stock; that they agreed to pay Stanton $220 for his stock and for any other stock he could get for them, regardless of what he paid for it; that it was because of this agreement that he endeavored to get Hample and Hamilton to sell their stock for $150, then $175, then $190, only telling them that the Armour representatives would pay $200 to prevent the breaking off of the deal; and that Armour & Co. afterwards paid him $220 a share for his stock, then added to it $20 a share for the number of shares owned by Hample and Hamilton, the latter payment being made because Armour & Co. were willing to pay $220 for the stock and paid it to Stanton instead of Hample and Hamilton because he succeeded in getting them to take $200 for their stock. We do not say, of course, that all this evidence is direct or uncontroverted. We merely say there was direct evidence to, and evidence from which the jury could properly infer, the state of facts above outlined. Controverted though some of it was, it was for the jury to say whether or no the facts above stated were established by the evidence, and this the defendant's counsel admitted by their failure to challenge the sufficiency of the evidence at any time or in any manner.

Summing up the two propositions, then, the first

combined agency with the other facts which the jury was required to find in order to return a verdict for the plaintiff. The second assumed that the jury might find the fact of agency not established by the evidence, in which event it was told that it could not return a verdict for plaintiff unless it found that "a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him." Considering the position that Stanton occupied in the Stanton Company, the efforts he made to induce Hample and Hamilton to sell their stock, the knowledge which the jury was entitled to find that he had of the price Armour & Co. was willing to pay for the stock and the pecuniary interest he had in inducing them to sell their stock for a less price, it is patent that if the jury found that under such conditions Stanton received a part of the consideration poid for their stock he ought to be required to pay it over to them, "regardless (as the trial court said) of the question of agency" (129-130). It clearly was money which in equity and good conscience he ought not to retain.

Equally clearly, if he could not conscientiously retain the money it could be recovered from him in this action. The action for money had and received is an amazingly effective instrument for penetrating artifices, devices, forms and technicalities, uncovering the real nature of a transaction, and then doing what everyday, common sense justice requires between the parties. It is, said Lord Mansfield, "a liberal action

founded upon large principles of equity", and lies whenever one who has received money cannot conscientiously retain it. It is "less restricted by technical rules than most others, as it aims at the mere justice of the case, and looks entirely to the question whether the defendant holds the money which in equity and good conscience belongs to the plaintiff." *Hoxter* v. *Poppleton,* 9 Ore., 481, 483. Judge Hawley said that "in order to support an action of this character there need be no privity of contract, except that which results from one man having another's money, which he has no right to keep. In such cases the law implies a promise that he will pay it over." *Leete* v. *Mining Co.,* 88 Fed., 957, 964. Affirmed by this Court, 94 Fed., 968. See also: *National Bank of Commerce* v. *Equitable Trust Co., 227* Fed., 526. Money was delivered to a carrier for carriage. He lost it at gaming. Held, the consignor could recover the money from the winner by an action for money had and received, the law implying a promise to pay "where one has received the money of another, and has not the right conscientiously to retain it." *Mason* v. *Waite,* 17 Mass., 560, 563. The holder of a warrant issued by a drainage district sued a county to recover the amount of the warrant, alleging that the county had improperly diverted to its own purposes the funds of the drainage district, and thus left the latter without means to pay the warrant. Held, that an action for money had and received would lie; that in such a case the question is: "To which party does the money in equity, justice, and law, belong?"; that the

funds of the drainage district ought to have been used in payment of the warrant, and therefore the county which had taken them without right, could not "in equity and good conscience" refuse to pay them to the holder of the warrant. *Board of Comm'rs.* v. *Dredging Co.,* 251 Fed., 249, 252. A loan of money was made which the borrower intended to secure by a mortgage on his crop, but by mistake the note and mortgage was made to another person. The latter foreclosed the mortgage. Held, that the lender could recover the money made by the foreclosure by an action for money had and received. *Boyett* v. *Potter* (Ala.), 2 So., 534. Of similar purport is *Heard* v. *Bradford,* 4 Mass., 326, where a claimant to a fund was held entitled to recover it from another claimant to whom it had been paid by mistake. In *Smith* v. *Lumber Co.,* 81 Wash., 111, an award in condemnation proceedings was paid into court. There were two claimants to the fund. The lower court held one of them, a corporation, entitled to the fund, and upon receiving it the corporation divided the fund among its shareholders, leaving the corporation insolvent. On appeal the other claimant was found entitled to the fund, and it was held that he could recover it by an action for money had and received against the corporation and its shareholders who had received the fund, although they had taken it in the honest belief that they were entitled thereto, because it is elementary that "whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money

had and received."

For other cases illustrating the efficiency and adaptability of the action for money had and received as an instrument for achieving justice in despite of forms and technicalities, see *Caldwell* v. *Maxfield* (S. D.), 64 N. W., 166, *First State Bank* v. *McGoughey* (Tex.), 86 S. W., 55, *Bates-Farley Bank* v. *Dismukes* (Ga.), 33 S. E., 175, *Law* v. *Uhrland,* 104 Ill., App., 263, *Montgomery* v. *Wise* (Mo.), 120 S. W., 100, *Cosmopolitan etc. Co.* v. *Koegel* (Va.), 52 S. E., 171, *Brooks* v. *Bank* (Okl.), 110 Pac., 47, *Richardson* v. *Drug Co.,* 92 Mo. App., 532.

In the light of the foregoing authorities, it cannot be doubted that the instructions when viewed as a whole were faultless. First the jury was told that if Stanton, acting as agent for the sale of Hample's and Hamilton's stock, by deceit got $20 a share on it which ought to have been paid to them it should find against him. Certainly that instruction was sound. Next it was told that if it found there was no agency there could be no recovery unless it found that a part of the consideration for the Hample and Hamilton stock was actually paid to Stanton. That is simply a statement of a well recognized primary rule of law, namely, that when one person gets another person's money without right, the other can recover it from him. That is sound law although no special circumstances were present. Considering Stanton's position, his earnest, almost desperate efforts to get Hample and Hamilton to sell their stock for a much

lower price than Armour & Co. would have paid for it, and the inference which the jury might justifiably draw from the whole transaction, namely, that Stanton expected to and actually did make a profit upon the sale of the Hample and Hamilton stock to the extent of the difference between what he could get it for and the $220 Armour & Co. was willing to pay, there can be no doubt of its soundness. Followed up, as these instructions were, by an instruction given verbatim as requested by Stanton's counsel, wherein his contentions were stated in detail, namely, that he, like Hample and Hamilton, was paid but $200 for his stock, that he received nothing on account of the sale of their stock, the remainder of the consideration received by him being paid for his collateral undertakings (131-133), and whereby the jury was told that its verdict must be in his favor if it found the facts as he claimed, no ground is left for reasonable or fair criticism of the instructions as a whole.

So much for the instructions as a whole. Now to the points which counsel make against the three portions they have isolated.

First it is said the scraps criticized are not supported by pleading or evidence. In so far as that claim is based on the contention—which is in fact its principal foundation—that there is no evidence to impugn Stanton's testimony that he was paid but $200 for his stock and the remaining consideration was

paid for his collateral undertakings, we shall decline to discuss it. It is plain that if there is no evidence to the contrary a challenge to the sufficiency of the evidence should have been sustained. Not only was no such challenge made, but Stanton's counsel, proceeding on the assumption that there was evidence in support of the opposed theories urged by the plaintiff and by the defendant, and that it was for the jury to determine which theory the evidence sustained, requested and were granted an instruction as to the burden borne by the plaintiff (120-121, 130-131), and also one which submitted to the jury as a question of fact whether Stanton's contention was sustained by the evidence (122-123, 131-133). The cases cited under the first head of this brief make it clear that Stanton's present counsel will not be heard in this Court to contend that there was no question of fact for the jury upon the opposed theories of the parties.

A supplementary contention is made, however, which is that with the question of agency eliminated, and in the absence of fraud or misrepresentation—of which, it is assumed, there is none—Stanton was at liberty to make any agreement with Armour & Co. that he could for making a profit out of the sale of the Hample and Hamilton stock, and this privilege was denied him by these instructions, wherefore there was error.

Assuming that under the circumstances here appearing the law is as counsel baldly state it, the requested instructions do not touch such a situation.

There is nothing in them to suggest that it would not be permissible for Stanton to make a legitimate profit out of the sale of the Hample and Hamilton stock to Armour & Co. There is no hint in them that if Stanton went as a broker from Armour & Co. to buy the Hample and Hamilton stock and made a profit in so acting he could not retain it. The instructions simply are that if a part of the consideration for the sale of the stock owned by Hample and Hamilton was paid to Stanton he could not retain it. That is merely a statement of the unquestioned fundamental principle governing actions for money had and received, *viz.*, that where one person has without consideration received another's money, he cannot retain it upon the demand of the other that he pay it over. 27 Cyc., 860. As said by Judge Hawley in *Leete* v. *Mining Co.*, 88 Fed., 957, one to whom money belongs may recover it by an action for money had and received, even though there be no privity of contract between the true owner and the recipient of the money "except that which results from one man having another's money which he has no right to keep. In such cases the law implies a promise that he will pay it over." Or, as said in *Law* v. *Ehrlaub*, 104 Ill. App., 263, 265, "an action for money had and received is maintainable whenever the money of one man has without consideration got into the pocket of another." While, as has been before remarked in this case, actions for money had and received are most commonly based upon cases where there has been a breach

of duty in a confidential relation, fraud, extortion, or some like wrong, nevertheless it is not essential that any such element should be present in order that a good cause of action should arise. Take the case of *Board of Commissioners* v. *Dredging Co.*, 251 Fed., 249, where a board of county commissioners had in entire good faith and simply from a mistaken view as to what the law permitted them, diverted to another purpose funds of a drainage district which ought properly to have been applied to payment of a warrant issued by the district. It was held that an action for money had and received would lie against the board of county commissioners to recover the amount of the warrant. So in *Heywood* v. *Assurance Co.* (Minn.), 158 N. W., 632, a case was presented of one person obtaining money which really belonged to another. There was no question of fraud or intentional wrong in the case. The case put by the court was simply this: Whether one person who had procured a payment to himself of money which he knows is due to another can retain it against such other. It was held he could not. In the same vein is *Smith* v. *Lumber Co.*, 81 Wash., 111, where there was doubt as to which of two claimants was entitled to a fund paid into court in a condemnation action. The lower court gave it to one claimant, but on appeal the other claimant was held entitled to it. It was held that an action for money had and received would lie by the one justly entitled to the fund against the other to whom it was awarded. To the contention that the action would not lie because there was no element of fraud

or duress in the case, but the claimant who received the money believed that it was honestly entitled thereto, it was said that "wrongs growing out of honest mistake can be redressed in a proceeding of this nature as well as wrongs growing out of fraud."

Now we repeat there is no hint in these instructions that Stanton could not legitimately make a profit in connection with the sale of the Hample and Hamilton stock, or that they would be entitled to recover from him any legitimate profit he might have made. The criticized instructions state clearly and concisely that it is only in the event that a part of the consideration for the sale of the Hample and Hamilton stock was paid to Stanton instead of to them that they are entitled to recover from him.

But even if the instructions would bear the construction which counsel seek to put on them, they were harmless under the issues and evidence in this case. Neither by pleadings, evidence, or requested instructions did Stanton make any claim to a commission for getting the Hample and Hamilton stock for Armour & Co. or admit in the slightest that he had made a profit out of the sale of their stock. On the contrary, he most vigorously denied having made any such profit and asserted emphatically that he was paid but $200 a share for his stock, the same that Hample and Hamilton were paid for theirs, and that the remainder of the consideration was paid him for his personal undertakings. Between the two opposing contentions there was no half-way ground. Either the plaintiffs

were right and Stanton had got a part of the consideration for their stock which ought to have been paid to them, or Stanton was right and he had been paid for his stock the same amount that the plaintiffs were paid and whatever additional amount he received was paid to him for his personal undertakings, having nothing whatever to do with the sale price of his stock or of the stock of the plaintiffs. Suppose, as counsel suggest, that the jury might have understood the instructions to charge that Stanton could not make a profit out of the sale of his associates' stock. How could that injure Stanton when his whole case is founded on the contention that no such profit was made?

At any rate, there is no place in this case for thought of legitimate profits and legitimate commission on the sale of the Hample and Hamilton stock with respect to which the jury might have been misled. Stanton, as before remarked, denies that any profit or commission was made. He says he received the same price, $200 a share, for his stock that was paid Hample and Hamilton, and that the remaining $92,266.66 which was paid him was for personal undertakings on his part. From the very nature of his story, the jury was obliged to accept or reject it in toto. If accepted, there was an end to the plaintiff's case. If rejected, still there could be no room for thought of his making a legitimate profit under the circumstances appearing. Counsel's contention in support of this assignment is that if the relation of prin-

cipal and agent did not exist, Stanton owed no duty to Hample and Hamilton, and that if he did not resort to actual fraud and misrepresentation he was free to make any arrangement he could for a profit from the sale of their stock, his position being compared to that of a broker who is entitled to any commission he can get.

Remembering what the evidence discloses, the statement of such a proposition as controlling this case betrays a very shallow knowledge of the law and an utter incomprehension of the principles of good conscience which control it. The comparison of Stanton to a broker who is entitled to any commission he could get is peculiarly unfortunate. If Stanton had gone frankly to Hample and Hamilton and told them that he came from Armour & Co. with a commssion to buy their stock, thus putting himself at the outset at arm's length to them, the argument advanced might be weighed. Under the evidence, however, if Stanton is to be considered as a broker he must be regarded as a broker for Armour & Co., unknown to Hample and Hamilton, who made use of his influential position in the Stanton Company to get their stock for Armour & Co. under the guise of acting in their interest, and in order to enable them to make an advantageous sale. We have it from Stanton's own lips that Hample and Hamilton had nothing to do with the management of the business, and knew nothing about it except what he told them from time to time (100). The business had prospered and they had no

thought of selling their stock, evidently were much disinclined to sell. But Stanton had determined to sell. He wanted to take a rest, his son would not take up the business, and he thought the present was the best possible time for getting out (79). He gave an option for the sale of 5084⅓ shares, more than the combined number of shares owned by himself, Hample and Hamilton, for $220 a share. He told no shareholder of his desire to sell out nor of the option. The option at that price was sufficiently attractive to bring the representatives of Armour & Co. from Chicago. After they had been in Spokane for several days, Stanton went to Butte to see Hample and Hamilton. He did not tell them of the option; he did not tell them that a quoted price of $220 had brought the Armour people from Chicago to look into the purchase of the property; he did not tell them of his personal reasons for desiring to sell. On the contrary, he self-confessedly led them to believe that Armour & Co. had taken up the question of a purchase of its own initiative; told them that its reason for doing so was that it desired to have a plant in Spokane; that if it did not purchase the Stanton plant it would build one of its own, with disastrous results to the Stanton property because of the severe competition that would result; that the plant was in bad shape, requiring repairs that would cost at least $150,000; that there was a large quantity of frozen meat on hand; that live stock was going higher; that conditions were unsettled, etc., etc., the net result be-

ing that they ought to sell for $150 a share if Armour & Co. would not pay more (101-102). His own testimony, then, shows that he went to Hample and Hamilton in the guise of the head of and largest shareholder in the Stanton Company, representing that he was actuated in doing so by the natural solicitude one in that position would feel for the shareholders in his company, and urged them to sell their stock for a very low price, arguing earnestly that the bad business prospects of the company demanded it. He did not tell them of the $220 quoted price which had interested Armour & Co. in the purchase; he did not tell them of the personal reasons which animated his desire to sell. He urged them to sell their stock for $150 solely upon the ground that the company's business outlook was very bad, and, be it remarked, he does not in this case attempt to show that the conditions were as he painted them. When to these considerations it is added that Armour & Co. a short time after paid $220 for all the Stanton Company stock, and that there was evidence from which the jury could properly find that Armour & Co. had determined that it would pay that amount and Stanton knew it would before he went to Butte; that he went to Butte to induce Hample and Hamilton to sell as cheaply as possible in order to make a profit on the difference between the $220 Armour & Co. would pay for their stock and the price he could induce them to sell for; and that because their stock was secured for $200 Armour & Co. paid Stanton $20 a share on

their stock, and a case was made—at least for the jury's consideration—of fraudulent concealment and misrepresentation which would authorize relief had they been the veriest strangers to each other, and the right to which cannot reasonably be questioned when their actual relation is considered.

The largest shareholder in and head of a corporation had been engaged in negotiations for a sale of land owned by it at a price which would greatly enhance the value of its stock. When the success of the negotiations seemed probable he purchased shares in the corporation through an agent, not disclosing his own interest or the pendency of the negotiations. There was no actual misrepresentation; nothing but concealment of the pending negotiations and of the identity of the purchaser. It was held that because the management of the corporation was virtually in his hands; that because of his "overwhelming influence" in the pending negotiations which it was evident he could defeat or bring to a successful conclusion as he chose; and that because no one knew so well as he "the probability of the sale of the lands" and "no one knew as well as he the probable price that might be obtained on such sale," he stood in a fiduciary relation to the shareholder and the sale would be avoided because he did not make full disclosure of all facts which might affect the value of the stock. *Strong* v. *Repide,* 213 U. S., 419.

We pause to remark that no one knew so well as Stanton the value of the Stanton Company stock and

all things which would affect its value. Hample and Hamilton knew practically nothing of those things except what Stanton told them. No one but Stanton knew the quoted price which had interested Armour & Co. in the purchase, and which (the jury might well find) it had told Stanton it would pay for the stock. No one but Stanton knew the personal reasons which made him desirous to sell. None of these things did Stanton disclose, but on the contrary urged Hample and Hamilton to sell their stock at a price far below what he must have known Armour & Co. would pay, upon grounds none of which is shown to be true, and most of which were plainly false. When to this is added evidence from which the jury would be warranted in finding that Stanton made a profit of $20 a share on the Hample and Hamilton stock by getting it for that much less than Armour & Co. was willing to pay for it, an invulnerable case is made against him of the receipt of money he ought not in good conscience to be permitted to retain.

In *Oliver* v. *Oliver* (Ga.), 45 S. E., 232, the case made was that a profitable sale of corporate property was in contemplation. Knowing this the president of the corporation secured an option on certain of the stock, and then purchased it when the sale was finally agreed on, thus making a large profit. No actual misrepresentation was charged; nothing but the withholding of information of the contemplated sale from the shareholder. In a masterly opinion holding that the shareholder could recover from the president the

profit he made, Mr. Justice Lamar (afterwards of the Supreme Court) pointed out how truly the corporate officer is in such a transaction a trustee for the shareholder, and how strong is the obligation resting upon the officer to disclose any information he may have which would affect the value of the stock. Among other things it was said:

> "Where the director obtains the information giving added value to the stock by virtue of his official position, he holds the information in trust for the benefit of those who placed him where this knowledge was obtained, in the well-founded expectation that the same should be used first for the company, and ultimately for those who were the real owners of the company. The director cannot deal on this information to the prejudice of the artificial being which is called the corporation, nor, on any sound principle, can he be permitted to act differently towards those who are not artificially but actually interested."

An analagous case is *Stewart* v. *Harris* (Kan.), 77 Pac., 277, it being charged that the president of a bank bought some of its shares for less than their actual value through not informing the shareholder of the prosperous condition of the bank. It was objected to a recovery that the shareholder could have known all about the bank's affairs; that its books were open to him and he could have advised himself fully concerning all matters which affected the value of the stock. Holding that was no reason for denying relief, it was said:

> "The diligence required by one to protect his interests is only such as a person of ordinary

> prudence would exercise under like circumstances. In a case like the one under review, the trust relation existing between the parties, the superior opportunities of defendant to know of the condition of the affairs of the bank, and his actual knowledge of its affairs, required no such diligence of inquiry on the part of plaintiff as is contended for by defendant. Plaintiff had the right to rely upon the belief that defendant would disclose to him the true condition of the affairs of the bank, and that he would not be called upon to investigate the condition of its affairs before he could with safety sell to defendant his holdings of stock. It is not the intent of the law to place a restraint on the affairs of business, when conducted fairly, honestly, and openly, nor to deprive one party to a contract of the advantage which superior judgment, greater skill, or better information may give; but it cannot give its approval to a course of dealing that will permit those occupying a trust relation to be unmindful of the trust, betray the confidence reposed, and profit by such betrayal."

Many other cases of similar effect might be referred to (they are cited, *supra*), but the reference is unnecessary. It is manifest that Stanton dealt unfairly with his associates, or at any rate it was a question for the jury if he did not, and therefore ought not to be permitted to retain the profit he made from them.

Counsel say that the issue presented by the criticized instructions was not within the issues made by the complaint and that this was recognized by the lower court, apparently referring to the fact that the court had given an instruction relative to the plaintiffs'

right of recovery if the jury found that Stanton was their agent. If the Court will but turn to the complaint it will observe that every fact covered by the instructions is covered by the complaint. The complaint sets out the relations of Stanton to the Stanton Company and to the plaintiff. It charges that he procured plaintiff to permit him (Stanton) to sell the plaintiffs' stock; that by deceit he got $20 a share on the price of plaintiff's stock and that this money is still retained by him without right. It covers, in other words, a case of agency, a case of fraud, a case of confidential relations, and the straightout case, unembarrassed by any other consideration, of one man getting and retaining another man's money without right thereto. If the plaintiff failed to prove everything alleged in his complaint, that would be no ground for denying him relief if he had still proved enough to bring his action within the principles governing actions for money had and received.

The second attack upon the instructions under consideration is prefaced by the assertion that counsel "have already shown" that the case was submitted to the jury on two inconsistent theories; tort and assumpsit. We find the same assertion of inconsistent submission made elsewhere in the brief, but nowhere demonstration of it; counsel contenting themselves with naked assertion.

We gather from counsel's argument, however, that their contention is that when the case was submitted to the jury on the theory that plaintiff was entitled to

recover if it found that defendant, while acting as plaintiff's agent, got $20 a share on his stock by fraud and deceit, it was submitted on the theory of tort, and when the jury was told that plaintiff could not recover if it found there was no agency unless it found a part of the consideration for plaintiff's stock was paid to defendant, the case was submitted on the theory that it was assumpsit. The notion is preposterous. Plaintiff, as required under the state practice, pleaded all the facts upon which he relied to recover. He pleaded not only agency, but the confidential relation in which defendant, as president and general manager of the Stanton Company, stood to him. He did not seek to set aside the sale or to recover damages for the wrong done him, but having alleged that by defendant's deceit he had obtained $20 a share on plaintiff's stock which in equity and good conscience belonged to plaintiff, he prayed recovery of that sum. Obviously here was a waiver of any other remedy, such as rescission, or to recover damages measured by the difference between actual value and the price paid, which the plaintiff might have had. An action cannot be *ex contractu* for one purpose and *ex delicto* for another, and where it is based on the waiver of a tort and the affirmance of a transaction, the waiver is for all the purposes of the case. *National Bank of Commerce* v. *Equitable Trust Co.*, 227 Fed., 526. It is not true, as counsel appear to suppose, that a plaintiff sues in tort when he alleges that by fraud, or by breach of a fiduciary obligation, the defendant ob-

tained his money. It is not true that to tell the jury that if it finds that the defendant by fraud or breach of duty obtained the plaintiff's money the plaintiff is entitled to recover, is to submit the case as one sounding in tort. Cases for money had and received spring more frequently from transactions where fraud, actual or constructive, imposition, extortion or duress are involved, than from any other. Cases cited, supra, 27 Cyc., 866, 2 R. C. L., 782. Of course under the reformed practice a plaintiff must state the facts upon which he relies for recovery, and cannot designate the action as one *ex contractu, ex delicto,* or in equity. Where, however, he sets out a fraud perpetrated upon him by which another has got his money, and does not seek to rescind or recover damages for the fraud but only to get the money that is his but was wrongfully diverted into the defendant's pocket, he is necessarily suing for money had and received and waives all other remedies. *National Bank of Commerce* v. *Equitable Trust Co.,* supra, 27 Cyc., 849. 2 R. C. L., 759. The complaint is drawn on the theory that the action is one for money had and received, for it charges that by the fraudulent transaction complained of the defendant obtained $20 a share on the plaintiff's stock, and this sum it seeks to recover. The instruction which it is said submitted the cause as one *ex delicto* does not depart from the theory of the complaint. Two of the essentials to plaintiff's recovery are there stated to be that it must be proved that Armour & Co. had agreed to pay $220

and not $200 a share for plaintiff's stock, and that it actually paid $220 therefor, $20 of which was wrongfully diverted to defendant (130). There is implied in the instruction what was plainly stated before, namely, that if the jury found for the plaintiff the recovery should be the $20 a share so obtained (129).

There are other portions of counsel's somewhat confused argument upon this point which seem to recognize that an action for money had and received may be based upon a tort, provided only the plaintiff waives his right to recover damages and seeks to recover nothing but his money which has actually gone into the defendant's pocket. We cainot understand how counsel could think that the plaintiff had taken any other position and counsel's argument does not inform us upon that point. Counsel talk about the "measure of damages" in an action for money had and received being different from the measure of damages where a tort is counted on. In truth there is no such thing as damages in an action for money had and received. The action is upon a contract, no less a contract because it is implied instead of expressed. It is not to recover any damage which the plaintiff has sustained through a wrong done him. It is to recover his property, his money which ought to be in his pocket but through the wrong of the defendant has gotten into the defendant's pocket. If, therefore, a plaintiff sues to recover his money which the defendant has received, and nowhere claims or attempts to prove damage done him by the wrong, he neces-

sarily waives the tort and sues on the implied contract. Looking to the complaint, the evidence, and the instructions, it will be observed that nowhere did plaintiff claim or attempt to prove damages, but throughout sought to recover merely the $20 a share which he asserts belongs to him, but which through the defendant's wrong has gone into the defendant's pocket. It is idle to attempt to make any submission of the case to the jury on the theory of recovering damages. The very first instruction given by the court stated that the plaintiff's claim was that the defendant had through wrong gotten $20 a share on the number of shares of stock owned by plaintiff, and that this $20 a share rightfully belonged to the plaintiff, and the jury was told that if it found such to be the case its verdict should be for the plaintiff in the amount of $20 a share, together with interest thereon from the time the defendant received it (128-129). The same thing is true of the next instruction given, the one upon which counsel apparently base their claim that the action was submitted as one in tort. While the court did not repeat its explicit declaration contained in the preceding instruction that the measure of recovery should be $20 a share, that is plainly implied (130-131). The same thought is contained, of course, in the criticized instruction now under discussion, for the jury was told that if the defendant received a part of the consideration for the sale of the plaintiff's stock the plaintiff was entitled to recover that amount.

It may be remarked in passing that the instruction which counsel contend submitted the case to the jury on the theory that it was one sounding in tort was an instruction requested by the defendant's counsel (120-121). That being so they cannot well complain of it.

The third objection to the criticized instructions is that they omit to say that plaintiff could only recover if the defendant had received plaintiff's money wrongfully and could not in equity and good conscience retain it.

It may be remarked that that element was necessarily included in these instructions. If a part of the consideration for the sale of the plaintiff's stock was paid to defendant without his giving anything of value therefor, plainly he could not in equity and good conscience retain it against the claim of the rightful owner. However, in giving an instruction it is not necessary that each isolated portion of it should state all the elements which are required to be submitted to the jury in the submission of the case. Reading the instructions as a whole it is patent that the jury could not have misunderstood that the plaintiffs were only entitled to recover if the defendant had wrongfully received their money and had no right to retain it. The very issues made between the two contending parties showed the jury must have so understood. The plaintiffs on the one hand contended that the defendant had, without consideration, through fraud, and in breach of the duty of a confidential relation,

obtained $20 a share on the number of shares owned by them of their money. The defendant, on the other hand, denied the plaintiff's contention in toto. He asserted that he had been paid precisely the same price for his stock that they were paid for theirs, and that the added consideration which he received was paid him for his personal undertakings. There was no middle ground for the jury to choose. If it found the defendant's story to be true it must necessarily have returned a verdict in his favor, for in such case he had none of the plaintiff's money. If, on the other hand, it found his story false, it necessarily accepted the plaintiff's theory, either in toto or sufficiently to establish that the defendant had, without right, and without consideration, gotten the plaintiff's money. We say, without right and without consideration, because the defendant asserted nothing except that he had never gotten a cent of their money, and if the jury found that he had got it is must necessarily find that he had gotten it without right and without consideration.

It should be remarked, moreover, that if the defendant's counsel thought the instruction not complete because it failed to say anything about equity and good conscience, they should have requested an instruction embodying that feature. It is like the case decided by this Court, where it was urged as error that an instruction defining adverse possession was not sufficiently full. The Court said that to assign error on omissions a request to make more full

is necessary. *Eastern Oregon L. Co.* v. *Cole,* 92 Fed., 949. As the Supreme Court has said, if a plaintiff in error desired "addition, amplification or qualification" it was necessary that he request it. *Ill. Cent. Ry.* v. *Skaggs,* 240 U. S., 66.

The fourth objection to the instructions is that there was undue repetition of the same proposition of law. Counsel overlook that this repetition was due in every case to the repetition of instructions which were favorable to defendant's contention, the criticized instruction each time it was given being an addendum to an instruction favorable to defendant. Thus the court charged the jury that if it found against the fact of agency, plaintiff could not recover unless it found that the defendant had in fact received the plaintiff's money. Obviously it would have been error for the trial court to have made the fact of agency the essential fact in the case and told the jury that plaintiff could not recover if it found no agency. The next time the instruction appears the trial court had given an instruction requested by the defendant as to what the plaintiff must prove in order to recover, and this instruction embodied the element of agency. To that the court added the criticised instruction that although the jury might find against the fact of agency, still the plaintiff could recover if it found that defendant had the plaintiff's money. Next the court gave another instruction requested by the defendant, which was that the defendant contended that he did not sell the plaintiff's stock, but that the plain-

tiff sold his own stock and fixed the price therefor, and the jury was told that if it found that to be the fact, then plaintiff could not recover. Again the court qualified the instruction with the statement that although it found the defendant did not sell the plaintiff's stock, yet if he had received a part of the consideration paid for the stock then plaintiff was entitled to recover. This repetition of the instruction which counsel criticize as undue is therefore seen to have been necessitated by the repetition of instructions requested by the defendant and favorable to his contention.

III.

Under the sixth specification of error it is assigned that judgment should not have been entered for the plaintiff because there was no evidence to sustain it. As we have heretofore pointed out, there was no challenge of the sufficiency of the evidence at any stage of the proceedings, but, on the contrary, the defendant requested instructions both with respect to the burden of proof resting upon the plaintiff and to the contentions made by the defendant which necessarily assumed that there was sufficient evidence for the jury to consider which of the opposing contentions was sustained by the evidence. We have heretofore cited controlling cases holding that under such conditions an appellate court would not consider an assignment that there was no evidence to sustain a recovery. In

addition to those decisions the Supreme Court has said:

> "If the finding of the jury was against the weight of the evidence, the remedy was by a motion for a new trial, which does not appear to have been made; and this court cannot exercise a function which was that of the jury."
>
> *Hedden v. Iselin,* 142 U. S., 676, 680.

No motion for a new trial appears in the record.

As heretofore remarked, just before the closing of the sale of the stock of Stanton, Hample and Hamilton to Armour & Co., the old board of directors of the Stanton Company, composed of Stanton, his son, and Hample and Hamilton, passed a resolution cancelling and discharging a $25,000 note which Stanton owed to the Stanton Company and giving him a Packard automobile owned by that company. There was conflicting evidence respecting the occasion for this action. The jury might well consider the transaction in determining upon the whole record where the truth lay; whether with the plaintiff or the defendant. As this Court is not concerned with that question, a discussion of the particular transaction cannot be of interest. This much, however, may be remarked. Stanton went to Butte to urge Hample and Hamilton to sell their stock to Armour & Co. for $150. He pressed upon them that so gloomy was the business future for the Stanton Company that he would gladly take that price for his stock if he could not get more. Accord-

ing to his own story he emerged from the deal three or four days later with $200 a share for his stock, over $120,000 more than he would have been glad to sell for, $92,266.66 for sundry collateral undertakings to only one of which, the guaranty of the accounts, could he have attached any substantial value, a discharged debt of $25,000, and a Packard automobile. Estimating the automobile to be worth $4,000, Stanton's gain in three or four days on what he considered his property to be really worth was $241,266.66. Yes, the jury may well have considered the $25,000 debt and the automobile in determining whether Stanton told the truth.

Oh, yes, there must not be overlooked either the agreement of Armour & Co. to pay him $220 for any of the stock he could get, regardless of the price he paid, which he says was put in as sweetening, in order to overcome his reluctance to accept the hard bargain offered him!

HAMILTON'S CASE.

There was involved in Hamilton's case an attempted rescission by him of the contract which he made in Spokane for the sale of his stock to Armour & Co. In that respect only does it differ from Hample's case.

It appears that Hample's contract provided that his stock should be deposited in the First National Bank of Butte, and that Armour & Co. should pay for it there within a stated time. Hamilton's contract was substantially similar except that it provided that his

stock should be deposited and paid for at the bank of W. A. Clark & Brother in Butte. Through mistake Armour & Co. sent settlement for both lots of stock to the First National Bank. Hamilton waited until some time after the stated period within which settlement was to have been made for his stock, then acting on the advice of some one in the bank who told him that he had the right to do so, he withdrew his stock and notified Armour & Co. that he considered himself released. Armour & Co. wired Mr. Kizer, then Stanton's attorney in Spokane, what had occurred, and Kizer posted off to Butte to fix up matters. Kizer evidently bluffed liberally, threatening Hamilton with suits to compel him to perform and advising him that he had better consult a lawyer before refusing to perform. Hamilton finally acted on this advice, and the lawyer whom he consulted advised him that he could be compelled to perform. In the meantime Hamilton had purchased 773 shares of the Stanton Company stock from one Overholt. After a time O'Hern, one of the Armour representatives in charge of the Spokane negotiations, arrived in Butte. Hamilton then delivered his stock, being paid for at the price and upon the terms stipulated in the Spokane contract; indeed, the very check and notes which had been mistakenly sent to the First National Bank were used in closing the transaction. A day or so later Hamilton sold the Overholt stock to Armour & Co. for $220 a share.

There was a good deal of conflict in the evidence

relating to this transaction, and it may be conceded that the jury might about as well have taken one view of it as the other. We have sketched it thus briefly because it is evident that it was for the jury to say whether the evidence sustained the view Stanton urges or the one that Hamilton maintains. It suffices that it was claimed for Stanton that Armour & Co. finally acquiesced in Hamilton's repudiation of the Spokane contract and a new agreement was reached; Armour & Co. agreeing to buy the Overholt stock for $220 and Hamilton agreeing that in consideration of the sale of the Overholt stock at that price he would sell his stock at $200, the price fixed in the Spokane contract. On the other hand, Hamilton claimed that, albeit reluctantly, he did not persevere in his attempted repudiation of the Spokane contract because of Mr. Kizer's threats to bring suit to enforce the contract and the advice of Mr. Sanders (Hamilton's attorney) that he had no chance to beat it. (Hamilton record, 68. Hample record 66). The sale of the Overholt stock, he claimed, was an entirely independent transaction, having nothing to do with his final decision to deliver his stock under the Spokane contract, that being done because he believed he was obliged to (Hamilton record, 71-72. Hample record, 69-70). Recognizing that it was for the jury to say whether the evidence sustained Hamilton's view or Stanton's view of the transaction under discussion, Stanton's counsel requested an instruction that if Hamilton repudiated the contract for the sale of his stock, claim-

ing that he had been induced to enter into it through misrepresentation or fraud, and that later Armour & Co. entered into another contract with him for the purchase of his stock and other stock in the same company, for which Armour & Co. paid him, that in such event he could not recover. The requested instruction was given with some very slight changes, and it is of these changes that counsel (ostensibly) complain.

The small changes made in the requested instruction did not affect its substance in the least. The thought expressed in the requested instruction was that if Hamilton repudiated the Spokane contract for the purchase of his stock, and subsequently Armour & Co., acquiescing in his repudiation of that contract and thus putting an end to it, entered into another contract for the purchase of his stock and other stock in the same company (the Overholt stock), and paid him therefor, he could not recover. The test of his right to recover, in other words, was whether he actually sold his stock under the Spokane contract or under a later contract, covering a different subject matter in important respects, which Armour & Co. made with him. If he abandoned his attempt to withdraw from the Spokane contract, and, yielding to the insistence of Armour & Co. that he perform it, delivered and was paid for his stock thereunder, then he could recover, for it was by means of that contract that Stanton got his money. On the other hand, if he persisted in the rescission of the Spokane contract,

and Armour & Co., yielding, made a new contract with him which also covered the Overholt stock, then he could base no claim through the Spokane contract thus put to an end, and could not recover.

Now, wherein does the instruction given depart from the instruction requested? In this only. The requested instruction read that if after repudiation of the Spokane contract the plaintiff "entered into another contract with Armour & Co. whereby he sold the stock," etc., he could not recover. The instruction given followed this language literally except in the use of the words "another contract." It read that if after repudiation of the Spokane contract the plaintiff "entered into a new and independent contract with Armour & Co. for a new consideration whereby he sold the stock," etc., he could not recover. Of course calling the contract referred to a "new and independent contract" instead of following the language of the requested instruction literally and speaking of it as "another contract" did not change the meaning. From Webster and the Century we have it that "another" means: "One more, in addition to a former number; * * * Not the same; different; a second, a further, an additional; one more; of a different kind, nature, or character * * * used by way of contrast." And so far as the introduction of the words " a new consideration" is concerned, it is quite generally understood that when a person speaks of a contract he means a valid, enforcible one, therefore necessarily based upon

a sufficient consideration. As to the addendum to the requested instruction, namely, that if on the other hand the jury found that the stock was finally delivered under the Spokane contract and not pursuant to some new and independent contract, then Hamllton's attempt to rescind would not bar his recovery, that was merely expressing an alternative which was necessarily implied in the requested instruction. In other words, when Stanton's counsel requested an instruction that Hamilton could not recover if he sold under another later contract and not under the Spokane contract, the alternative was necessarily implied that if he sold under the Spokane contract and not under another later contract he could recover. It was this alternative which in the addendum the trial court put in words instead of leaving it to be implied.

It is plain, therefore, that counsel are merely complaining that the trial court spoke of a "new and independent contract" instead of following the requested instruction literally and referring to "another contract." That is sheerest cavilling, quibbling, trifling; highly improper in this Court and unworthy of counsel of standing.

We feel the less hesitancy in characterizing the urging of this assignment of error as we have because counsel's argument convinces us that we have correctly characterized it. There can be no misunderstanding concerning the conflicting evidence to which the requested instruction was directed. It was

claimed for Stanton that because of Hamilton's persistent refusal to deliver his stock under the Spokane contract Armour & Co. made a new contract with him, agreeing to pay him $220 a share for the Overholt stock in consideration of his delivering his own stock at the price fixed in the Spokane contract. Hamilton's claim, on the other hand, was that Armour & Co. refused to yield and insisted that he should deliver his stock under the Spokane contract; that Kizer threatened him with a suit to enforce performance and his attorney told him he had no defense thereto, in consequence of which he finally acquiesced in the demands of Armour & Co. and delivered his stock under the Spokane contract; that the sale of the Overholt stock was an independent transaction, consummated several days later. Now, counsel do not suggest what distinction, that evidence considered, there can be drawn between referring to the alleged new contract made in Butte under which Stanton insisted Hamilton's stock was delivered as "another contract," as in the requested instruction, and referring to it as "a new and independent contract," as in the instruction given. Neither do they, assuming there is a distinction, point out how the change in verbiage could be injurious to Stanton. We confess that we cannot follow their argument, but so far as we can understand them the point they would make is that as matter of law Hamilton rescinded the Spokane contract when he withdrew his stock from the bank and noti-

fied Armour & Co. he would not perform; that such action was an irrevocable election not to be bound by the Spokane contract, and he would not be heard to say that he thereafter accepted its terms and delivered his stock under it; and that therefore it was error to submit to the jury the question of whether he delivered his stock under the Spokane contract or under a later one. That, of course, is not good law. There was no rescission of the contract although Hamilton attempted to rescind if Armour & Co. stood upon it and insisted that Hamilton perform, and Hamilton, yielding to the insistence of Armour & Co., did perform. Of course the election of one party to rescind, which is accepted by the other party, terminates a contract. If the right to rescind is disputed, however, the one seeking to rescind may abandon his attempt and acquiesce in and perform the contract, in which event there is no rescission and the contract stands as though rescission had never been attempted. 13 Corpus Juris, p. 626, §691, *McNaught* v. *Assurance Society,* 121 N. Y. Supp., 447. But that proposition of law is purely a moot question in this case. Stanton's trial counsel took a position which is diametrically opposed to that which his present counsel seek to take. If as matter of law Hamilton's mere attempt to rescind was a completed rescission, an election not to be bound by the contract which estopped him to say it was in force, although Armour & Co. refused to accept his election and compelled him to

perform, then a verdict should have been directed against him. Stanton's trial counsel not only did not move for a directed verdict or in any other way challenge the sufficiency of the evidence to sustain a recovery by Hamilton, but they requested an instruction submitting to the jury as a question of fact which of the opposed contentions was sustained by the evidence; whether Hamilton delivered his stock under the Spokane contract as he claimed, in which event he could recover, or whether he delivered it under another contract made later on, as contended by Stanton, in which event he could not recover. Stanton's present counsel know perfectly well that with that requested instruction staring them in the face they would not be heard to contend directly that no question of fact was involved, but a pure question of law, and that therefore it was error to submit the question of which contract Hamilton delivered his stock under to the jury. Because they know it they invented the pretext that the trial court erred in substituting in the instruction given the words "a new and independent contract" for the words "another contract" in the instruction requested, then, making no pretense of suggesting wherein the substitution was either harmful or technical error, they proceed to argue that no instruction of that sort should have been given because as matter of law the Spokane contract was put an end to by Hamilton's attempt to rescind. If that be not sheer quibbling, mere trifling without shadow

of excuse, we do not know the meaning of those terms.

Respectfully submitted,

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IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. H. STANTON,
Plaintiff in Error,
vs.
J. L. HAMILTON,
Defendant in Error.

No. 3538

Error to the United States District Court for the Eastern District of Washington

REPLY BRIEF OF PLAINTIFF IN ERROR

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ARGUMENT.

Since the questions involved, which we will discuss in this brief, are identical in the two cases, Nos. 3537 and 3538, we will confine ourselves to the filing of brief in the Hamilton case. We will consider the suggestions made by Defendant in Error in their order.

It is stated (Brief 4): "Early in 1917 Stanton gave Wilson & Co. an option on his stock for $200 a share, which option was not exercised." We failed to refer to this fact in the opening brief, and it has some bearing, since, from this, it appears that Stanton was willing to sell for $200 a share up to the time the option was given on May 8, 1917, but the packers, Wilson & Co., did not desire to exercise such option.

It is said (Brief 5) that Stanton's "conclusion was that they ought by all means, to sell the stock and that he would take $150 a share for his stock if he could not do any better." Stanton never pursued any other course than one consistent with a desire to sell. He was, however, as was natural, endeavoring to get the best price possible.

It is said (Brief 7), that this excess which Stanton received over $200 a share amounted exactly to $20 a share on the stock Stanton, Hamilton and

Hample. This is conceded, but it proves absolutely nothing, except that the parties used that method of determining what would be paid Stanton for the three additional agreements. Why this method was used was explained by the witnesses Robbins, O'Hern, Kizer and Stanton, and there is nothing inconsistent or unreasonable in the explanation nor any evidence to the contrary.

It is said (Brief 7), "the conclusion is irresistible that Stanton sold his own stock at the price stated in the option, $220 a share, and then procured to be added to it $20 a share on the Hamilton and Hample stock." Why such a conclusion is irresistible, is not explained. The conclusion, however, we submit is irresistible, even if there was not such an overwhelming uncontradicted evidence on that point, that Armour & Co. was buying, in addition to Stanton's stock, his agreement not to enter into business, his guarantee of the accounts, and his agreement to assist in the business and that the consideration for these agreements constituted the excess of $92,266.67 over $200 a share.

It is said (Brief 8) that Armour & Co. also agreed to purchase from Stanton within four months any stock he might acquire from other stockholders at $220 a share. This simply shows, what was stated in our opening brief, that Armour & Co. finally was willing to pay for a majority, or all of the stock, together with the three personal

agreements from Stanton, a sum which would be produced by multiplying the total number of shares acquired by $220. Nothing else can be gathered from the evidence. The three additional agreements were Stanton's, and the payment therefor belonged to Stanton, and neither Hample, Hamilton nor any other stockholder had any interest therein.

It is said (Brief 8) "the evidence is overwhelming that the pretense that the sum over $200 a share that was paid him for his stock was paid for these incidental agreements is the veriest sham. In any event it was obviously a question for the jury upon the direct testimony and the inferences reasonable to be drawn from all the evidence as to the true nature of the transaction between Stanton and Armour & Co." Assertions are not proof, and there is at this place in the brief no attempt made to sustain these assertions. We shall now proceed to show that the only attempt at any place in the brief to support these assertions did not reach the point, or purport to reach the point, and that there is scarcely an attempt to support the claim that a sum in excess of $200 a share was paid for the stock. The only discussion on this point is found in Defendant in Error's brief at pages 12 to 34, inclusive, and we invite the court's careful consideration to these pages.

It is first said (Brief 12) that "Stanton's trial counsel took the view that there was evidence to

take the case against him to the jury." The fact that Plaintiff in Error's trial counsel did not make a motion for non-suit, can not put into the record evidence that is not there; nor can it make a case for the jury if in fact there was no such evidence. The most that can be said is that Stanton's trial counsel had failed to analyze the evidence, due to the hurry attending the trial.

Next is a suggestion (Brief 12) that counsel for Stanton requested instruction on the theory of the claim made by the complaint. This was no confession of anything; it was simply construing the complaint.

Next, it is suggested (Brief 13) that the sufficiency of the evidence can not be raised now, because there was no motion for non-suit. This suggestion has nothing to do with the determination of the question whether there was or was not evidence to establish that a sum in excess of $200 a share was paid for the stock. It may be that counsel for Stanton should have made a request for a peremptory instruction, but their failure to do so would not change the evidence that is before the court. However, on the necessity for a requested peremptory instruction, we submit that the ultimate end in the trial of a law suit is to see that justice is done, and it would seem hardly possible that a judgment would be permitted to stand where it is plain that no right of action existed. How-

ever, a decision on the questions raised in this case does not rest upon the fact that there is no evidence to sustain the verdict.

It is further said (Brief 17) Hample and Hamilton both testified that Stanton urged them to leave to him the negotiations for selling all their stock to Armour & Co., saying that "he would drive as hard a bargain with Armour & Co. as he could, would not sell his stock unless he also sold theirs, and that they should receive the same price for their stock that he received for his." It is true that there is such evidence, but it has no bearing on the question as to whether more than $200 was received for the stock. If there was nothing in excess of $200 received for the stock, then Stanton violated no agreement with Hample and Hamilton and wronged them in no manner, and it is not contended that he did not attempt to drive as good a bargain as possible. In driving such bargain, however, there was no duty on the part of Stanton to contribute his own individual property and rights for the purpose of swelling the purchase price of the stock.

It is next suggested (Brief 17) "it is equally manifest that the question whether Stanton was paid $220 a share for his stock plus $20 a share on the Hample and Hamilton stock" was for the jury. It is said that it is a remarkable coincident that this additional amount received by Stanton

over $200 a share was exactly $20 a share for the stock of Stanton, Hample and Hamilton. Even if it was remarkable, there would be nothing in that circumstance alone to show that this additional amount was paid for the stock, and especially when the written contract between Armour & Co. and Stanton was introduced in evidence and shows that the $576,400 was paid for Stanton's stock and these three additional agreements. The evidence as to why this method was used is uncontradicted, and we must submit that there is nothing unreasonable in it. In other words, if the amount paid for these additional agreements had been an even $100,000, then, according to Defendant in Error's position, they would have no standing in court, but since the amount happened to be $92,266.67, which amount could be produced by multiplying the number of shares of Stanton, Hample and Hamilton by $20 that it thereupon made a case. The proposition, of course, is absurd.

It is said (Brief 19), "true, he says that after they had examined it, they said they would not take it at $220 a share, but the fact that they did pay that and more for the stock proves that he prevaricated in that as he did in so many other things during the progress of the trial." This statement, of course, is without any foundation, as there is no evidence that Armour & Co. did take the stock at $220 a share, but these agreements to retire from business, the guarantee of accounts

and agreement to assist in the business were necessary in order to obtain the price that was paid by Armour & Co.

The suggestions (Brief 20) about what took place when Stanton was at Butte have no bearing whatsoever upon the price paid by Armour & Co. for the stock. Stanton may have been pessimistic about the value, and he may have been over-anxious to sell, but there is no contention that he did not drive as hard a bargain as he could in making the sale. He violated no duty to Hample and Hamilton.

The suggestion (Brief 21) that Armour & Co. agreed to pay $220 a share for any additional stock which Stanton might secure is entirely in harmony with our contention that Armour & Co. finally were willing to pay for a majority, or all, of this stock, together with the three agreements from Stanton, an amount produced by multiplying the number of shares acquired by $220.

The above, we believe, comprises the sum total of the arguments of Defendant in Error for the purpose of establishing that a price in excess of $200 a share was paid for the stock. We submit that such argument is not only weak, but that it does not attempt to go to the point, and the suggestions made have no bearing on the question whatever, and that counsel for Defendant in Error knew absolutely that the arguments advanced were not

sound and could not stand. It is pertinent to observe that it has not been pointed out how Stanton was compensated for his agreement to retire from business, his guarantee of the accounts on which he had paid $22,534 and his assistance in the business for one year, unless this $92,266.67 belonged to him, nor has there been any attempt to suggest any reason why Hample and Hamilton should be the beneficiaries of these agreements.

It is suggested (Brief 27) that the trial court did not err in instructing the jury that the amount of recovery was $20 a share if they found in favor of Defendant in Error, and in not allowing any deduction on account of the commission payable to Grinnell, because Grinnell did not perform his contract in that Armour & Co. would not pay cash. However, there is no force in this suggestion, as the evidence conclusively shows that Stanton, Hample and Hamilton all waived the payment of cash, and, under such conditions, the agent is still entitled to his commission. Further, it is suggested that the court had a right to eliminate the question of commission because Stanton's contention is that but $200 a share was paid for the stock. If Stanton's contention was not sustained in this respect, this would not give Defendant in Error a right to recover more than in "equity and good conscience" he was entitled to receive.

It is further suggested (Brief 28) that, at the

request of Stanton's counsel, the court instructed the jury that the option feature of the agreement with Grinnell was unenforceable. This instruction related only to the option feature; it had nothing to do with the other provision in the agreement that a commission was to be paid if a sale was made.

It is said (Brief 28) that "there is not an atom of evidence that Stanton waived the terms of purchase stated in the Grinnell option." The evidence on this point, however, is absolute that Stanton dealt with the purchasers procured by Grinnell, and agreed with them to accept payment in the manner shown by the contract.

It is said (Brief 30) that if this instruction was erroneous, "it was the duty of counsel to request an instruction concerning that view." It was not a question of the trial court giving additional instructions about which complaint is made. The error was that the instruction given was erroneous and required the jury to return a verdict of $20 a share, when, if there was anything for them to consider at all, the amount of the verdict should be less, or, in any event, the jury should have been permitted, under the "equity and good conscience" rule, to determine the amount. For the court to have given any other instruction on the subject which would correct the error, it would have been necessary to withdraw the instruction already given.

It is suggested (Brief 31) that Hample and Hamilton testified that Stanton agreed himself to take care of Grinnell's commission. This testimony, however. was contradicted by Stanton, and it was therefore, in any event, a question for the jury, but even with this evidence of Hample and Hamilton, if there was such an agreement, it related to a sale being made at $200 a share, and had nothing to do with the situation now existing when Defendant in Error is claiming a right to repudiate that sale and to recover on basis of a sale at $220 a share.

The authorities cited at pages 32, 33, 34 and 35 of the brief have no bearing whatsoever upon the error in this instruction. As suggested before, the criticism of the instruction is not that it was not sufficiently full, but that it was a positive statement that Defendant in Error was entitled to recover a certain amount, when, under the law, if a recovery could be had it would be a lesser amount. Amplification of the instruction could not cure the error; it could only be cured by the withdrawal of such erroneous instruction.

With reference to these three additional agreements on the part of Stanton and the right, assuming Defendant in Error was entitled to recover, of the jury to take such facts into consideration under the "equity and good conscience" rule, and the instruction by the court that the amount of recovery

should be $20 a share, Defendant in Error again urges that the objection is not open, because counsel for Stanton should have requested additional instruction (Brief 36). But the situation here was exactly the same as with reference to the Grinnell commission. Additional instructions would not cure the error; it could only be cured by withdrawal of the erroneous instruction.

Further, at the same page, it is urged that counsel for Stanton should have pleaded these three additional agreements for the purpose of minimizing a recovery. This, however, could not be true, as the question involved was the extent of Stanton's liability, if there was a liability. The evidence introduced by Defendant in Error showed the facts, and any evidence introduced by Stanton was without objection and was properly before the court and jury. In no event, however, would an affirmative pleading be necessary, as the question at issue was what amount, if any, did Stanton receive which in "equity and good conscience" belonged to Defendant in Error. Defendant in Error could claim nothing more.

It is said (Brief 37) that the complaint in this case was strictly for money had and received, and it was not on the theory of both tort and implied contract. It is, however, at once manifest that the complaint clearly states a cause of action in tort, and if this were not true the trial court proceeded

on that theory, as shown by the instruction quoted in Specification of Error 3, and it is perfectly apparent from said instruction that the court submitted the case to the jury on the two theories. Even if the complaint was only for money had and received, the error still exists, since the court submitted the case on the two theories.

It is said (Brief 39), that in Specifications of Error 2, 3 and 4 we have selected "isolated parts of three different instructions." These are not isolated parts, they all deal with an additional theory of recovery submitted by the court, and there is nothing in the instructions as a whole that minimizes, or seeks to minimize, such instructions. As suggested in the opening brief, there are only two possible constructions of this criticised portion:

(1) That if without fraud, breach of agency, or representing Defendant in Error, and without having had anything to do with the sale of Hample and Hamilton's stock, any of the purchase price was paid to Stanton, he was liable.

(2) If Stanton received a commission on the sale of Hample and Hamilton's stock, or had an agreement with Armour & Co. that as to any stock purchased at less than $220 a share, he was to have, and did receive, the difference, he was liable.

As to the first theory, Stanton would not be liable unless the money was paid to him for the use and benefit of Hample and Hamilton, and not

paid to him as his own. There is no suggestion in the evidence that this was done, and, in fact, the whole theory of the case on part of Defendant in Error was that it was not paid on that assumption. The very contract with Stanton shows that it was paid to him as his own.

On the second theory, it, of course, would not be true that Stanton would be liable if the money was paid to him as commission, or under any other character of agreement when he was not representing Hample and Hamilton, made no misrepresentations, did not sell their stock and committed no wrong.

At pages 44 *et seq.* citations of cases having to do with money had and received are made. A discussion of the law of money had and received is of no importance. While this form of action is a liberal one, no cases are to be found permitting a recovery where money is paid to another, and received by such other, as his own, and such other person has violated no duty to anyone. Nor are there any cases that permit a recovery where one has received money without the commission of wrong and under lawful agreement.

It is said (Brief 47), "it is true that if the criticised instructions stood alone, and were not supplemented by the other instructions, they are not so complete as they might have been made, or, probably, as the trial judge would have made them if

he had given no other instructions touching the evidence necessary to sustain the action." However, counsel has not pointed out any instruction given by the trial court which corrected these errors or removed the sting.

It is further suggested (Brief 48) that the instruction was peculiarly sound "if a part of the consideration for the sale of the Hample and Hamilton stock was in fact paid to and retained by Stanton, his relation to them, and his concealment of matters vitally affecting the transaction, were such that he could not in equity and good conscience keep it." Counsel has here forgotten his lines. He has overlooked the fact that in these criticised instructions the trial court has carefully excluded any violation of agency, and any misrepresentations in sale of the stock by Stanton.

It is stated (Brief 49), "it is generally accepted that the mere fact that a person is a director of a corporation imposes no fiducial obligation upon him in dealing with a shareholder concerning the latter's stock." Following this, at various pages of his brief, counsel refers to cases of dealings between an officer of a corporation and stockholder, and seems to intend to claim some advantage by reason thereof. In the first place, counsel is still considering the correctness of the instructions set out in Specifications of Error 2, 3 and 4 and these instructions exclude any dealings on the part of

Stanton for Hample and Hamilton, exclude agency, exclude any sale of their stock and proceed on the theory that they sold their own stock. Second, there is no evidence that the stock was sold for a sum in excess of $200 a share. Third, under the law of the State of Washington, where Stanton & Co. had its existence, and the place where the contract was made, a stockholder dealing with an officer of his corporation is dealing at arm's length, and no relationship of trustee exists between them. *Haverland vs. Lane,* 89 Wash. 557 (154 Pac. 1118.) The decisions of the Supreme Court of the State of Washington are controlling.

It is said (Brief 55) in referring to these instructions and what the jury was told, "that is sound law, although no special circumstances were present." If this was true, which is not, it nevertheless does not reach the point. One of the complaints alleged against these instructions is that, if they stated the law correctly under the theory that if any money was paid to Stanton for the use and benefit, or as the money of, Hample and Hamilton, they could recover, there was no foundation in the evidence for any such instructions, and they were purely abstract, and under the universal authority, were prejudicial error.

It is said (Brief 60), "neither by pleadings, evidence or requested instructions did Stanton make any claim to a commission for getting the Hample

and Hamilton stock for Armour & Co., or admit in the slightest that he made a profit out of the sale of their stock." True, Stanton made no such claim, but if there is a possible theory under the evidence in this case that Stanton profited through the sale of the Hample and Hamilton stock, it must be on the theory of commission, or some other agreement with Armour & Co. There certainly was no evidence that any of the money was paid to Stanton as belonging to or for the use and benefit of Hample and Hamilton. The contract with Armour & Co. was for the payment of the money to Stanton for his stock and his three agreements and for no other purposes.

It is further suggested (Brief 62), "under the evidence, however, if Stanton is to be considered as a broker he must be regarded as a broker for Armour & Co. unknown to Hample and Hamilton, who made use of his influential position in the Stanton Co. to get their stock for Armour & Co. under the guise of acting in their interest." But again, counsel overlooks the point under discussion, and the fact that these instructions exclude the question of agency, and the question of Stanton having anything to do with the sale of the Hample and Hamilton stock. Fraud, agency, misrepresentations, and dealing with the stock have nothing to do with considering these instructions, because it was all excluded by the court.

It is suggested (Brief 74) that counsel for Stanton requested the uncriticised portion of the instruction contained in Specification of Error 3. Quite true, but this instruction was a statement on the theory of the complaint and entirely justified by the complaint, and the theory on which the case was tried, and the trial court so understood the situation as shown by the giving of this instruction.

It is suggested (Brief 75) that the failure of the trial court to embody in these instructions the "equity and good conscience" rule can not now be urged, since counsel for Stanton should have requested additional instructions. But additional instructions which would reach the point could only have the effect of nullifying the instructions already given, if their prejudicial effect was to be removed. There is no rule, however, which requires a litigant to request the trial court to withdraw an erroneous instruction.

It is said (Brief 76) that the repetition of this instruction three times was invited by counsel for Stanton. The court will look in vain for anything supporting this statement. The instructions requested by counsel for Stanton were proper and recognized by the trial court as proper, but the objectionable portion was engrafted on the court's own motion.

With reference to Specification of Error 5, the

instruction dealing alone with the Hamilton case, counsel argues that the criticism of this instruction is the use of the words "new and independent contract." This is not the theory of Plaintiff in Error. The theory of Plaintiff in Error is that it was immaterial whether a new and independent contract was made or not. That Hamilton could not recover if he withdrew his stock from the bank, notified Armour & Co. that, by reason of their failure to perform, and the alleged fraud and misrepresentations of Stanton, the contract was at an end. He could not thereafter proceed to deal with Armour & Co. and turn over his stock and receive pay therefor and still make a claim against Stanton. Hamilton had exercised his election and he could not thereafter as against Stanton change that election; further, he knew absolutely at that time, as shown by his letters, all that he knew at any time afterward, and if a fraud had been committed, he knew of that fact and had a right to rescind. If more than $200 a share was paid for his stock, nobody knew it better than Armour & Co., and Armour & Co. could not defend against rescission.

The authorities cited (Brief 86) on the question of Hamilton's right to withdraw his rescission have no bearing upon the question. Undoubtedly, as between Hamilton and Armour & Co. the rescission could be withdrawn, but these authorities have no

bearing upon the effect of the rescission as to third persons.

In conclusion, we submit there has been nothing advanced by Defendant in Error to sustain the judgment in this case. When Defendant in Error's brief is carefully considered, it will be observed that the questions involved have been avoided and the discussion has been directed largely to questions not involved. There is scarcely an attempt to claim that a recovery on the evidence could properly result. A very large portion of the brief has been directed toward an attempt to show that Stanton's counsel had in some manner waived his rights, and that this court should now find some method of carrying into effect a wrong judgment.

Respectfully submitted,

JAMES A. WILLIAMS,
DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff in Error.

IN

The United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KATHRYN STRUETT, Formerly KATHRINE SMITH,

Appellant,

vs.

HARRY B. HILL,

Appellee.

TRANSCRIPT OF RECORD

WM. P. LORD,

Solicitor for Appellant.

GRIFFITH, LEITER & ALLEN and ROBERTS & SKEEL,

Solicitors for Appellee.

FILED
JAN 3 - 1901

THE ARCADY PRESS AND MAIL ADVERTISING CO., INC.

The United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Be It Remembered, That on the second day of March, 1919, there was duly filed in the District Court of the United States for the District of Washington, Southern Division, a Complaint in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Kathryn Struett, formerly Katherine Smith,
Complainant,

Vs.

Harry B. Hill, Respondent.

NO. E. 85

COMPLAINT

Filed March 25 1919

To the Honorable Judge of the Above Entitled Court, in Equity Sitting:

The bill of complaint of Kathryn Struett, exhibited against Harry B. Hill, in a suit in equity to cancel,

annul, and set aside a certain deed, is now brought to Your Honor in this District for the causes and matters hereinafter set forth and thereabout your orator complains and alleges:

I.

That the complainant, Kathryn Struett, is a citizen and resident of the State of Oregon and maintains her domicile in the City of Portland in said State, and she is now and at all times herein mentioned, has been a citizen of a different State than the respondent.

II.

That Harry B. Hill, now is, and at all times herein mentioned, has been a citizen and resident of the State of Washington, and a resident in said State and within the City of Altoona, County of Wahkiakum, Washington, and is now a citizen of a different State than the complainant herein.

III.

That the amount or value in controversy in this suit is in excess of, and greater than the sum of Three Thousand Dollars, ($3,000.00), exclusive of interests and costs.

IV.

That on or about the 13th day of October, 1906,

Sarah J. Anderson, the mother of ~~the~~ complainant, conveyed to complainant, Kathryn Struett, the following described real property, situated in the County of Clarke, State of Washington, to-wit:

> Beginning 37.42 chains East and 15.68 chains South of the Northwest corner of Section 10, Tp. 2, North Range 1 East W. M., running thence South 4.32 chains to the Southeast corner of the Hannah J. Tyszkiewicz tract, thence East 17.81 chains, more or less, to the center of the County road, thence North 7 degrees and 45 minutes West along said road 4.36 chains, thence West 17.28 chains, more or less, to the place of beginning, containing 7.58 Acres, more or less.

Reserving, however, unto the said Sarah J. Anderson, and her assigns, the free and unobstructed use during the period of her natural life, of all improved lands on said described tract and of all improvements thereon.

V.

That thereafter, and on or about the 16th day of June, 1912, the said Sarah J. Anderson died and complainant is possessed of the rights and interests in the said described property, but for the acts and things herein complained of, brought about and done by respondent, Harry B. Hill.

VI.

That after the death of said Sarah J. Anderson, and on or about the 21st day of September, 1912, the complainant mortgaged to John Kramer for a consideration of Five Hundred Dollars ($500.00), the said described premises, and the said mortgage was for two years, at 8 per cent interest, and on or about the 19th day of October, 1915, the said mortgage was past due and the said John Kramer had commenced a suit in the Superior Court of the State of Washington, for Clarke County, against complainant to foreclose said mortgage, all of which was well known to respondent.

VII.

Your orator further charges and causes Your Honor to be informed that Kathryn Struett is a very sensative and affectionate woman, and for many years prior to the 10th day of August, 1916, Kathryn Struett, complainant, and Harry B. Hill, respondent, were firm, fast and close intimate friends, engaging and entering upon all manners and sorts of confidential and intimate relationships comprising their social and commercial intercourse between themselves and with others; that the respondent was many years older than the complainant and during said times, the respondent did represent and persuade complainant to believe that he possessed an overpowering affection for complainant, and had her interest at heart, that his intentions towards plaintiff

were honorable, and by reason thereof, complainant was accustomed to, and did repose unbounded confidence in the advice, consort and opinions of respondent, Harry B. Hill, and considered and acted upon his every request as equivalent to a command and direction the thing required or bidden of her, the said Kathryn Struett, to be done, and so it was that during the times hereinafter mentioned, the respondent exercised his said influence in such manner that Kathryn Struett at all times, and in all affairs relative to her plans and proposals in business and society acted in consort and accordance with the plan, purpose, advice and counsel of Harry B. Hill, and this relationship during all the times herein mentioned existed and continued.

VIII.

Your orator further charges that during the times herein mentioned, complainant, Kathryn Struett, in her private life and business affairs was influenced, prevailed upon and affected by the counsel, advice and acts and doings of Harry B. Hill, in such a way and manner that Harry B. Hill, using his strength of will, influence and persuasion with complainant, Kathryn Struett, that on or about the 10th day of August, 1916, and for a long time prior thereto, was under the sole influence, control and direction of the respondent, Harry B. Hill.

IX.

Your orator further charges that during the year

1916, the complainant Kathryn Struett was engaged in the rooming house business in the City of Portland, State of Oregon, and was not prospering in her said business, and was beset with financial difficulties and by reason thereof was much perturbed and distressed as well as by her relationship with respondent, who, during the times herein mentioned, was a married man, but had been separated from his wife for several years, and whom he represented to complainant, was residing in the East, and from whom he would secure a divorce at a proper time; that during the times herein mentioned, and for some time prior thereto, the respondent had ingratitated himself with complainant's relatives by causing them to believe that respondent had a great affection for Kathryn Struett, complainant, and his attentions, affections and interest in complainant were serious and honorable, and her acts and doings in her relationship with respondent were prevailed upon and affected by the counsel of her said relatives, who urged and importuned the complainant to act in accordance with the advice, counsel and direction of respondent, Harry B. Hill; that during the times hereinbefore mentioned, respondent, Harry B. Hill, was residing away from the City of Portland, Oregon, and was visiting at complainant's home for several days each month, and was constantly writing to complainant during his absence of his affection and regard for her; that respondent represented to complainant that she need not

worry about the lack of success attendant upon the operation of her said rooming house, and the moneys due on the Kramer mortgage, for the respondent was able to and would pay and discharge said mortgage, as a present and expression of his, respondent's affections and regard for complainant, and would provide for her; and during said times, respondent was making complainant small presents and entrusting her with moneys which respondent was investing in some device, and representing to complainant that he was giving her an interest in said device when it was patented; that during said times, respondent was representing to complainant that he had applied for an endowment insurance policy in the principal sum of Five Thousand Dollars, ($5,000.00), in which complainant was named as the beneficiary with the respondent, and that he had made a disposition of his property by last will and testament, and that the complainant was the beneficiary therein; so that complainant would not come to want in event of respondent's death, and thereupon, and on or about the 20th day of October, 1915, or thereabout, the respondent paid the aforementioned mortgage together with interest and taxes, and the same on said day was cancelled and satisfied of record, and respondent informed complainant that the same was a present to complainant from respondent, and was an expression of his, the respondent's appreciation and affection for complainant.

X.

That thereupon and between the 20th day of October, 1915, and the 10th day of Aug., 1916, the said respondent, Harry B. Hill, in order that he might keep said complainant under his influence and control, and that he might obtain, possess and control said described property, did advise, direct, solicit, influence and prevail upon Kathryn Struett to believe, and did cause her to believe, and did represent to her, the said Kathryn Struett, that the real property hereinbefore described would become involved and wholly lost to her unless she conveyed said property over to respondent, that complainant should convey said property over to respondent to protect her against her improvidence and so that she would always have it, and respondent would re-convey said property when complainant so desired, and when complainant would request a conveyance thereof.

XI.

And your orator further charges that Harry B. Hill, respondent, so that he might keep Kathryn Struett under his influence and control and obtain said real property, and accomplish the transfer of it to him for his own use and benefit, to the exclusion of her, Kathryn Struett, and in pursuance thereof, while keeping her under his influence and control and inciting her in perplexity and distress so that she did not have the independence of mind or resort to other independent and un-

prejudiced advice, and while depriving her, Kathryn Struett, of her free agency of mind and will and the untrammeled exercise of her powers of individual preference in all the manners and ways hereinbefore described, the said respondent, Harry B. Hill, in breach of the confidential relationship as apparent friend and confidential advisor, when really designing to act for his own interest and personal benefit, did prevail upon, induce and procure complainant, Kathryn Struett, to make and execute a certain deed without consideration, and really made and executed because of and pursuant to the aforesaid influence and described representation as hereinbefore described and not otherwise, on the 10th day of August, 1916, to Harry B. Hill, respondent, herein, of all the following described property in Clarke County, Washington, being the property first in this bill of complaint described as follows, to-wit:

> Beginning 37.42 chains East and 15.68 chains South of the Northwest corner of Section 10, Tp. 2, North Range 1 East W. M., running thence South 4.32 chains to the Southeast corner of the Hannah Tyszkiewicz tract, thence East 17.81 chains, more or less, to the center of the County road, thence North 7 degrees and 45 minutes West along said road 4.36 chains, thence West 17.28 chains, more or less, to the place of beginning, containing 7.58 Acres, more or less.

XII.

Your orator further causes Your Honor to be informed and therefore alleges that respondent did not immediately have said deed recorded, the same having been witnessed and acknowledged so as to entitle it as a deed of record, and that thereafter, and on the 6th day of June, 1917, the respondent, Harry B. Hill, caused said deed to be recorded in the Deed Records of Clarke County, Washington, being Volume 120, of said Deed Records, at Page 587 thereof.

XIII.

Your orator further charges that the aforesaid deed of August 10th, 1916, of Kathryn Smith, now Kathryn Struett, to Harry B. Hill, as described, was so far as complainant, Kathryn Struett, was concerned, without consideration, and that the execution of the same was obtained by respondent, Harry B. Hill, by the means and under the influences hereinbefore set forth, and without any other consideration therefor; that prior to the filing of this bill of complaint, the complainant has requested and demanded the respondent to re-convey said described property to the complainant, but respondent has refused so to do and does now refuse so to do; that respondent, Harry B. Hill, did not at the date of said deed, pay, nor has not since paid any consideration whatsoever therefor, and took said lands pursuant to

a secret intention to keep and secure said lands for himself, all of which was done in violation of the breach of confidence and relationship between friend and friend, when in relation of advisor one to the other and against the law.

XIV.

Forasmuch as your orator is without remedy elsewhere than in equity and has no speedy, plain, adequate or complete remedy at law and to the end that Your Honor may consider of the foregoing facts and matters and pronounce in accordance with equity and good conscience to the full relief of your orator;

May it please Your Honor to issue and grant unto your orator who now prays, a writ of injunction and restraining order *pendente lite,* in accordance with the rules and practice of this Court, directed against the respondent, his agents. servants, confederates and employees, and those acting, by, through, or under him, from in any manner incumbering, disposing of, or in any wise changing the status in regard to, the said real property in this bill of complaint described, or any of its tenements, appurtenances or hereditaments thereto belonging, and to immediately desist, quit and refrain from in any wise doing anything to affect or interfere with the title and possession thereof until such time as Your Honor shall appoint and direct, or may order herein; and if upon any hearing had then the writ of

restraint herein prayed for be held and confirmed until final determination of this suit, and thereupon said injunction and restraining order may be made perpetual.

Your orator further prays that the deed dated on or about the 10th day of August, 1916, in Clarke County, Washington, in Volume 120, at Page 587, of the Deed Records of Clarke County, Washington, by Kathryn Smith, now Kathryn Struett to Harry B. Hill, conveying property therein described as set forth be set aside, cancelled, annulled and held for naught, and that the respondent, Harry B. Hill, be required to surrender and deliver up the said deed and that he be forever barred, enjoined and foreclosed from setting up any estate right title or interest in the premises described in said deed.

Your orator prays for such other, further, separate, additional and different general relief as the nature of the case may allow and that shall to the conscience of Your Honor in equity sitting appertain and seem meet in the premises.

May it please Your Honor thereto to grant unto the complainant a writ of subpoena in conformity to practice and rules in equity directed to the said respondent, Harry B. Hill, commanding him at a certain time and under penalties provided by law and the aforesaid rules, personally to appear before this Honorable Court and there and then full, true and correct and perfect

and recorded on or about the 6th day of June, 1917

answer make to all and singular the premises and to stand to, perform and abide by such other, further or different order, direction and decrees of this Court as shall seem meet to be granted by Your Honor and agreeable to equity and good conscience; and that Your Honor issue and grant, pursuant to the Acts of Congress in such cases made and provided, your order herein directing the respondent to appear and answer under oath and on or before a day certain the several allegations of this, your orator's bill, in accordance with the rules aforesaid, and the rules and established practice of this Honorable Court.

MRS. KATHRYN STRUETT,
Complainant

WM. P. LORD,
Solicitor for Complainant and of Counsel

United States of America }
District of Oregon } ss.

I, Kathryn Struett, being first duly sworn, on oath depose and say that I am the complainant in the within entitled suit; that I have read the foregoing Bill in Equity and know the contents thereof, and the same is true as I veritably believe

KATHRYN STRUETT

Subscribed and sworn to before me this 18th day of March, 1919

WM. P. LORD,
Notary Public for Oregon
My commission expires Dec. 22, 1920

And Thereafter, to-wit, on the ~~sixth~~ 10th day of May, 1919, there was duly filed in the District Court of the United States for the District of Washington, Southern Division, an answer, in words and figures as follows, to-wit:

(Title Omitted)

To the Honorable Judge of the Above Entitled Court in Equity Sitting:

Respondent answering the complaint of the complainant admits, denies and alleges as follows:

I.

Answering Paragraphs I, II, III, IV, VI, and XII of the complaint, respondent admits each and every allegation thereof as alleged.

II.

Respondent answering Paragraphs VII, VIII, X, XIII and XIV of the complaint denies each and every allegation of each and all of said Paragraphs VII, VIII, X, XIII and XIV.

III.

Respondent answering Paragraph V of complaint

admits that on or about the 16th day of June, 1912, the Sarah J. Anderson mentioned in the complaint died and that complainant then became possessed of rights and interests in the property described in the complaint.

Further answering said Paragraph V of the complaint, respondent denies each and every allegation therein contained, save and except as in this answer admitted.

IV.

Respondent answering Paragraph IX of the complaint admits that the complainant was, during the year of 1916, engaged in the rooming house business in the City of Portland, State of Oregon.

Further answering said Paragraph IX of the complaint, respondent denies each and every allegation in said Paragraph IX contained, save and except as in this answer admitted.

V.

Respondent answering Paragraph XI of the complaint admits that the complainant executed and delivered to the respondent a certain deed on or about the 10th day of August, 1916, and that the property described in said deed is the same as that described in said Paragraph XI of the complaint.

Further answering said Paragraph XI of the complaint the respondent denies each and every allegation in said Paragraph XI contained, save and except as in this paragraph admitted.

For a separate answer and defense to the complaint of the complainant, the respondent, Harry B. Hill, alleges as follows:

I.

That between the first day of January, 1914, and the 10th day of August, 1916, the respondent loaned and delivered to complainant for her accommodation and at her request, without any time being agreed upon for repayment, sundry and divers sums of money amounting in the aggregate to the sum of One Thousand (1,000) Dollars.

II.

That on said 10th day of August, 1916, complainant made, executed, acknowledged and delivered to the respondent her deed in fee simple whereby the said complainant conveyed and sold to the respondent as security for said aggregate debt and taxes the following described property and premises, to-wit:

The following described real estate situate in the County of Clarke, State of Washington, to-wit:

Beginning 37.42 chains East and 15.68

chains South of the Northwest corner of Section 10, Tp. 2, North Range 1 East W. M., running thence South 4.32 chains to the Southeast corner of the Hannah Tyszkiewicz tract, thence East 17.81 chains, more or less, to the center of the County road, thence North 7 degrees and 45 minutes West along said road 4.36 chains, thence West 17.28 chains, more or less, to the place of beginning, containing 7.58 Acres, more or less.

Which certain deed was intended and agreed between the parties thereto to be and to operate simply as a mortgage of said premises and as security for the payment of the aggregate debt aforesaid and for the repayment of any and all taxes thereafter paid by respondent upon said property, together with interest at legal rate; a copy of which deed in words, letters and figures is as follows:

The Grantor, Katherine Smith, a widow, formerly Katherine Anderson, for and in consideration of One thousand and no/100 dollars in hand paid, conveys and warrants to H. B. Hill, of Cascade Locks, Oregon, the following described real estate situate in the County of Clarke, State of Washington, to-wit: Beginning 37.42 chains East and 15.68 chains South of the Northwest corner of Section 10, Township 2 North Range 1, East W. M., running thence South 4.32 chains to Southeast corner of the Hannah Tyszkiewicz tract, thence East

17.81 chains more or less to the center of the county road; thence North 7 degrees 45 minutes West along said road 4.36 chains, thence West 17.28 chains more or less to the place of beginning containing 7:58 acres more or less.

Dated this 10th day of August, A. D., 1916.

(Signed) KATHERINE SMITH (Seal)
Executed in presence of:

(Signed) F. W. TEMPES.

State of Washington
County of Clarke } ss.

I, F. W. Tempes, do hereby certify that on this 10th day of August, A. D. 1916, before me personally appeared Katherine Smith to me known to be the individual described in and who executed the within instrument, and acknowledged to me that she signed and sealed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and Official Seal, this 10th day of August, A. D. 1916.

(Seal) (Signed) F. W. TEMPES,

Notary Public in and for the State of Washington, residing at Vancouver in said county.

III.

That after the execution and delivery of said deed, intended as a mortgage, and on the fifth day of February, 1918, the respondent at the request of the complainant and in accordance with said agreement paid the taxes on said land amounting to the sum of fourteen and 38/100 ($14.38) dollars.

IV.

The the respondent thereafter and before the commencement of this suit demanded payment of said sums and both of them with interest, but the complainant refused and still refuses and neglects to pay the same or any part thereof.

Whereby respondent, Harry B. Hill, prays:

1. For judgment for the sum of One Thousand ($1,000) dollars, with interest at the rate of six (6) per cent per annum from the fifth day of February, 1918, and for costs and disbursements of this suit.

2. That the said deed may be adjudged to be a mortgage and the first lien upon the premises described in said deed for the aggregate amount of said debt and interest, costs and disbursements.

3. That the usual decree may be made for the sale of said premises by the proper officer, according to law,

and the practice of this court:

That the proceeds of said sale may be applied (1) To the expenses of sale and costs and disbursements of this suit. (2) To the payment of the aggregate amount due to the respondent, together with interest, and that the said complainant and all persons claiming under her subsequent to the execution of said deed, either as purchasers, incumbrances, or otherwise, may be barred or foreclosed of all rights, claims, or equity of redemption in the said premises, and every part thereof, and that the said respondent may have judgment and execution against the said complainant for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment.

4. That the respondent or any other party to the suit may become a purchaser at said sale; that the proper officer selling said property in said foreclosure execute a deed to the purchaser; that said purchaser be let into the possession of the premises on production of said officer's deed thereof; and that the respondent may have such other or further relief in the premises as to this court may seem meet and equitable.

JOHN W. ROBERTS and
GRIFFITH, LEITER & ALLEN,
Attorneys for Respondent.

State of Oregon
County of Clatsop } ss.

You, Harry B. Hill, swear, or solemnly affirm that what is contained in this, your answer, as far as concerns your own act and deed is true of your own knowledge, and that what relates, to the act and deed of any other person or persons, you believe to be true.

HARRY B. HILL,

Subscribed and sworn to before me this third day of May, A. D. 1919.
(Seal) OLOF ANDERSON,

Notary Public for the State of Oregon. My commission expires January 14, 1921.

State of Oregon
County of Multnomah } ss.

Due and legal service of the within answer is hereby admitted in the City of Portland, County of Multnomah, State of Oregon, this sixth day of May, 1919, by receiving a true copy thereof, duly certified to as such by Harrison Allen, counsel for respondent.

WM. P. LORD,
Of Attorneys for Petitioner

And Thereafter, to-wit, on the fourth day of June, 1919, there was duly filed in the District Court of the United States for the District of Washington, Southern Division, a

REPLY

in words and figures as follows, to-wit:

(Title Omitted)

To the Honorable Judge of the Above Entitled Court in Equity Sitting:

Complainant replying to respondent's further and separate answer and defense, admits, denies and alleges as follows:

I.

Complainant denies each and every allegation set forth in Paragraphs I, II, III and IV of respondent's separate answer and defense.

Wherefore, complaintant reiterates the prayer contained in her complaint filed herein.

WM. P. LORD,
Attorney for Complainant

Filed June 4, 1919.

United States of America }
District of Oregon } ss.

I, Kathryn Struett, being first duly sworn, on oath depose and say that I am the complainant in the within cause; that I have read the foregoing copy of Reply and the same is true as I verily believe.

MRS. KATHRYN STRUETT,

Subscribed and sworn to before me this second day of June, 1919.

(Seal) WM. P. LORD,
Notary Public for Oregon
My Commission Expires
Dec. 26th, 1920

United States of America
District of Oregon } ss.

Due and legal service of the within reply to respondent's separate answer and defense herein is hereby admitted in Portland, Oregon, this sixth day of June, 1919.

GRIFFITH, LEITER & ALLEN,
of Solicitors ~~Attorneys~~ for Respondent

Filed June 4, 1919.

And Thereafter, to-wit, on Wednesday, the 29th day of October, 1919, in the District Court of the United States for the District of Washington, Southern Division, before the Honorable Edward E. Cushman, Judge of said District Court, in equity sitting, the following proceedings were had, to-wit:

(Title Omitted)

This cause came regularly on to be heard before the Honorable Edward E. Cushman on Wednesday, the 29th day of October, 1919. Complainant was present in person and by William P. Lord, her counsel, and respondent was present in person and by John W. Roberts, his counsel, and both parties having announced themselves ready for trial, the cause was heard and tried to the Court without a jury. During the progress of the trial the respondent requested permission to amend the complaint so as to allege the payment of taxes for the years of 1915 and 1917. Counsel for complainant did not object, and the amendment was permitted by the Court. Both parties having introduced their evidence and rested their case and the Court having heard the argument of counsel, and being fully advised in the premises finds:

I.

That the complainant has failed to establish the allegations of her complaint, and is not entitled to recover in the action, and the complaint of complainant should be dismissed.

II.

The Court further finds that the complainant Kathryn Struett is indebted to the respondent, Harry B. Hill

in the sum of One Thousand Dollars ($1,000.00) for moneys advanced, and in the sum of Twenty-nine and 20/100ths Dollars ($29.20) for taxes advanced and paid by the respondent, and that complainant is indebted to the respondent in the sum of $1,029.20 with interest thereon at the rate of six per cent per annum from the 29th day of October, 1919, until paid.

III.

That Kathryn Struett, the complainant, was formerly Katherine Smith, and that Kathryn Struett, the complainant, is the same person who, on the 10th day of August, 1916, executed to Harry B. Hill a deed conveying to the said Harry B. Hill the following described property in Clarke County, Washington, to-wit:

> Beginning 37.42 chains East and 15.68 chains South of the Northwest corner of Section 10, Tp. 2, North Range 1 East W. M., running thence South 4.32 chains to the Southeast corner of the Hannah Tyszkiewicz tract, thence East 17.81 chains, more or less, to the center of the County road, thence North 7 degrees and 45 minutes West along said road 4.36 chains, thence West 17.28 chains, more or less, to the place of beginning, containing 7.58 Acres, more or less.

Which deed was and is duly filed for record on the sixth day of June, 1917, in the records of Clarke County,

Washington, and recorded in Volume 120 of Deeds at page 587 thereof. That said deed was given by the complainant Kathryn Struett, then Katherine Smith to the respondent Harry B. Hill to secure to him the repayment of moneys advanced, which sum the Court now finds to be $1,029.20, and that the same is a mortgage and constitutes a first and prior lien upon the above described premises, to secure to Harry B. Hill the payment of said sum. together with interest and costs of this action, and he is entitled to have the same foreclosed in manner by law provided, and said property sold to pay said indebtedness, together with interest, costs and disbursements.

It is, therefore, now by the Court ordered, adjudged and decreed that the action of Kathryn Struett, formerly Katherine Smith, the complainant herein should be and the same is hereby dismissed with costs.

And it is further ordered, adjudged and decreed that Harry B. Hill do have and recover of and from Kathryn Struett, formerly Katherine Smith, a judgement for and in the sum of One Thousand Twenty-nine and twenty-one hundredeths Dollars ($1029.20) with interest thereon at the rate of six per cent per annum from the 29th day of October, 1919, until paid, and for all proper costs and disbursements of the action.

And it is further ordered, adjudged and decreed that that certain deed made, executed and delivered by Kath-

erine Smith, now Kathryn Struett, to Harry B. Hill on the 10th day of August, 1916, and which is recorded in the office of the County Auditor of Clarke County, Washington, in Volume 120 of Deeds at Page 587 thereof, be and is hereby declared to be a mortgage and a first lien upon the following described real estate in Clarke County, Washington, to-wit:

> Beginning 37.42 chains East and 15.68 chains South of the Northwest corner of Section 10, Tp. 2, North Range 1 East W. M., running thence South 4.32 chains to the Southeast corner of the Hannah Tyszkiewicz tract, thence East 17.81 chains, more or less, to the center of the County road, thence North 7 degrees and 45 minutes West along said road 4.36 chains, thence West 17.28 chains, more or less, to the place of beginning, containing 7.58 Acres, more or less.

for the payment to the said Harry B. Hill of the said sum of $1029.20, with interest thereon at the rate of six per cent per annum from the 29th day of October, 1919 until paid, together with all proper costs and disbursements of this action, and the costs of the sale of said premises, and that said mortgage be foreclosed and said property sold by the marshall in the manner by law provided, and that upon a confirmation of said sale a certificate of purchase issue to the purchaser at said sale, and that the complainant Kathryn Struett, formerly Katherine Smith, and any and all persons claim-

ing or to claim by, through or under her, be and they are forever barred and foreclosed of and from any and all right, title, interest or equity of redemption in or to said premises, or any part thereof.

Dated this 20th day of November, A. D. 1919.

EDWARD E. CUSHMAN,
Judge

Filed November 20, 1919.

And Afterwards, to-wit, on the 18th day of May, 1920, there was filed in the District Court of the United States for the District of Washington, Southern Division a

PETITION FOR APPEAL

in words and figures as follows, to-wit:

(Title Omitted)

The complainant above named, conceiving herself agrieved by the decree and judgment made and rendered in the above entitled Court in the above entitled cause, and entered therein, on the 20th day of November, 1919, at the regular July term, 1919, of said Court, in favor of the respondent, in the above entitled cause, and against the said complainant therein, wherein and whereby it was ordered, adjudged and decreed that the

Bill of Complaint herein be, and the same was dismissed, and that the said respondent have and recover of and from said complainant the sum of One Thousand and Twenty-nine and twenty hundredths ($1.029.20) dollars, with interest at the rate of six (6) per cent per annum from the 29th day of October, 1919, until paid, and also costs and disbursements of the suit, and that certain deed between Kathrine Smith, as grantor and Harry B. Hill, as grantee, recorded in Volume 120 of the Deed Records of Clarke County, Washington, at page 587 thereof, conveying the premises therein described, was a mortgage to secure the payment of the sum of money with interest hereinbefore set forth, and that said mortgage be foreclosed, and said property be sold by the Marshal in the manner provided by law, does hereby appeal from the said judgment and decree and from the whole and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

And the said complainant files herewith her assignment of errors, asserted and intended to be urged by her, upon this, her said appeal.

And the said complainant prays that this, her petition for said appeal, and her said appeal may be granted and allowed, and that citation issue herein as provided by law, and that a transcript of the record, proceedings and papers, upon which said judgment and decree was

so made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and also that an order be made fixing the amount of security or bond, which the said complainant shall give and furnish upon this, her said appeal, to the effect that she shall prosecute her appeal and will answer all damages and costs if she fail to make her plea good on appeal, and your petitioner will ever pray.

KATHRYN STRUETT,
Complainant and Appellant

WM. P. LORD,
Solicitor for Appellant

Filed May 18, 1920.

And Afterwards, to-wit, on the 18th day of May, 1920, there was filed in the District Court of the United States for the District of Washington, Southern Division, a

CITATION

in words and figures as follows, to-wit:

(Title Omitted)

United States of America, ss.

To Harry B. Hill, defendant above named,

To Harrison Allen and to John W. Roberts, attorneys for the defendant above named:

GREETING

Whereas, Kathryn Struett, the complainant in the above entitled suit, has appealed to the United States Circuit Court of Appeals for the Ninth District from the judgment rendered and made in the above entitled court in the above entitled cause, and entered herein on the 20th day of November, 1919, in favor of the respondent in the above entitled cause, and against the complainant therein, and the said appeal has been allowed and the security by law has been given;

Now, Therefore, you and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from and after the date of this citation to show cause, if any there be, why the said judgment and decree appealed from should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward E. Cushman, Judge of the District Court of the United States for the District of Washington (Southern Division) with the seal of said Court hereunto affixed this 17th day of May, 1920.

EDWARD E. CUSHMAN,

Judge of the District Court of the United States for the District of Washington (Southern Division).

United States of America)
District of Washington) ss.

Service of the within citation is hereby admitted this 18th day of May, 1920.

JOHN ROBERTS,
Of Attorneys for Respondents

Filed May 18, 1920.

And Afterwards, to-wit, on the 18th day of May, 1920, there was filed in the District Court of the United States for the District of Washington, Southern Division, an

ASSIGNMENT OF ERRORS

in words and figures as follows, to-wit:

(Title Omitted)

The complainant above named complains of the judgment and decree made and rendered in the above entitled cause in the above entitled Court, and entered therein, as alleged in her petition for an appeal therefrom, and of errors in the proceedings in this cause and in connection with her said appeal she will assert and rely upon the following assignment of errors:

I.

The District Court of the United States for the District of Washington, Southern Division, erred in sustaining the respondent's objection to the receiving and admitting in evidence of certain exhibits referred to in the transcript of testimony herein.

II.

The Court erred in making Findings of Fact in favor of the respondent and not in favor of the complainant.

III.

The Court erred in finding that the complainant failed to establish the allegations of her complaint and was not entitled to recover in this action, and in dismissing the complainant's complaint.

IV.

The Court erred in finding and in entering judgment against complainant and in favor of respondent for the sum of One Thousand ($1,000) Dollars and the further sum of twenty-nine and twenty hundrdeths ($9.20) dollars with interest thereon at the rate of six (6%) per cent per annum from the 29th day of October, 1919, and in entering judgment and decree therefor in favor of the respondent and against the complainant.

V.

The Court erred in finding that the certain deed filed for record on the sixth day of June, 1917, in the Records of Clarke County, Washington, and recorded in Volume 120 of the Deed Records at page 587 thereof, wherein Kathrine Smith was grantor and Harry B. Hill was grantee, conveying the following described premises in Clarke County, Washington, to-wit:

> Beginning 37.42 chains East and 15.68 chains South of the Northwest corner of Section 10, Tp. 2, North Range 1 East W. M., running thence South 4.32 chains to the Southeast corner of the Hannah Tyszkiewicz tract, thence East 17.81 chains, more or less, to the center of the County road, thence North 7 degrees and 45 minutes West along said road 4.36 chains, thence West 17.28 chains, more or less, to the place of beginning, containing 7.58 Acres, more or less.

was given by the complainant to the respondent to secure him the repayment of moneys advanced, which the Court found to be in the sum of $1,029.20 and was a mortgage to secure to respondent the payment of said sum with interest and costs of this suit, and in entering a decree declaring said mortgage to be a lien upon said described real premises, and directing that the same should be foreclosed and said property sold by the marshal in the manner provided by law, and in further or-

dering and adjudging that upon a confirmation of such sale a certificate of purchase issue to the purchaser, and that the complainant be forever barred and foreclosed of any and all right, title, interest or equity of redemption in or to said premises.

VI.

That the decree is against the manifest weight of evidence.

VII.

The Court erred in holding and deciding that the complainant was not entitled to the relief prayed for in her complaint herein.

Wherefore this complainant prays that the said judgment and decree made, rendered and entered herein in favor of said respondent and against the said complainant, as aforesaid, be reversed and held for naught, and that a judgment and a decree be rendered and entered herein in favor of the said complainant and against the said respondent, as prayed for in her Bill of Complaint herein, and that the said complainant may have a decree for such other and further relief as may be in conformity with the law and practice of this Court, and as may be proper in the premises.

WM. P. LORD,
Solicitor for Appellant

Affidavit of service by mailing omitted.

Filed May 18, 1920.

And Thereafter, to-wit, on Tuesday, the 18th day of May, 1920, in the District Court of the United States for the District of Washington, Southern Division, before the Honorable Edward E. Cushman, judge of said District Court, in equity sitting, the following proceedings were had, to-wit:

(Title Omitted)

Now, on this 18th day of May, 1920, the above entitled cause coming on regularly to be heard, on the petition of the above named complainant, praying that an appeal be allowed herein to review the judgment and decree herein, and praying that an order may be made fixing the amount of the security or bond herein, which the said complainant shall give and furnish upon her said appeal for the prosecution of the appeal with due diligence and to pay the costs and disbursements which may be awarded against her on said appeal in event said decree or any part thereof in this cause be affirmed; and the said complainant having filed herein and presented to this Court her said petition, and therewith an assignment of errors relied upon and intended to be urged by her upon her said appeal; and it appearing to the Court that the said complainant is entitled to said appeal and said order; now, therefore, on motion of

Wm. P. Lord, solicitor,

It Is Ordered that upon the said plaintiff entering into and giving a bond for the amount, and conditioned as hereinafter mentioned, that the said appeal be and the same is hereby allowed, and that citation issue herein, as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and decree was so made and entered duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and

It Is Further Ordered that the amount of the cost bond on appeal is hereby fixed by the Court in the sum of Seven Hundred Fifty ($750) Dollars, but said bond does not have the effect to stay execution herein.

Dated this 18th day of May, 1920.

EDWARD E. CUSHMAN,
Judge

Filed May 18, 1920.

(Title Omitted)

Now, at this time, May 17, 1920, on motion of counsel for complainant above named for an order of the above entitled Court enlarging and extending the time for the appellant above named to file record on appeal, and appearing to the Court that good cause is shown and exists for such order;

It Is Ordered, that the time for the said complainant to file the record of appeal in the above entitled cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and to docket the said cause with said clerk, be and the same is hereby enlarged and extended for a period of 17 days up to and including the first day of July, 1920.

Dated this 18th day of May, 1920.

EDWARD E. CUSHMAN,
United States District Judge

Filed May 18, 1920.

And Afterward, to-wit, on the 27th day of November, 1920, there was duly filed in the District Court of the United States for the District of Washington, Southern Division, two

STIPULATIONS

in words and figures as follows, to-wit:

(Title Omitted)

It is hereby stipulated by the attorneys for the respective parties, as follows:

1. That the time within which the appellant has to

file transcript on appeal in the above entitled Court upon appeal from the United States District Court for the District of Washington, Southern Division, may be enlarged and extended up to and including the 20th day of November, 1920.

2. That Edward Cushman may approve and certify to the transcript of the testimony and exhibits now on file in the office of the clerk and that the testimony of the witnesses in the above entitled cause need not be reduced to narrative form, in order to preserve the true character and meaning of the testimony.

Dated this 23rd day of October, 1920.

WM. P. LORD,
Solicitor for Appellant

ROBERTS & SKEEL,
Solicitors for Appellees.

Not waiving jurisdictional questions heretofore raised.

(Title Omitted)

It is hereby stipulated and agreed by and between the parties hereto, in order to facilitate the appeal herein, as follows:

1. That the appellant will prepare the transcript of record on appeal in the above entitled suit, and print the

same, and that the clerk of the District Court of the United States may certify that the printed transcript is in accordance with the stipulation of counsel, without comparison with the original record, pursuant to new rule of the Court of Appeals, making effective the Congressional Act of February 13, 1911, but it is expressly understood and agreed that prior to the delivery of said record to the printer that the same shall be delivered to the attorney for the appellee for inspection and that thereafter, before the transcript of record is delivered to the Clerk of the District Court for certification, said record shall be delivered to the attorney for the appellee for comparison and that the record shall bear certification of the attorney for the appellant that he has compared the printed record with the original record and that the same is true and correct copy thereof.

2. That the Court may make an order extending appeallant's time to the 10th day of December, 1920, as time within which to docket this cause and file transcript of record with the clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Dated this 13th day of November, 1920.

WM. P. LORD,
Solicitor for Appellant
ROBERTS & SKEEL,
Solicitors for Appellee

Filed November 27, 1920.

And Thereafter, to-wit, on the .....day of December, 1920, in the District Court of the United States for the District of Washington, Southern Division, before Honorable Edward E. Cushman, judge of said District Court, in equity sitting, the following proceedings were had, to-wit:

(Title Omitted)

Based on stipulation herein:

It Is Oredered, that the time within which to file transcript on appeal and docket this cause with the clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, be and the same is hereby extended for a period of ten (10) days from the expiration of the present time.

Dated this.....day of December, 1920.

EDWARD E. CUSHMAN,
Judge.

And Thereafter, to-wit, on the 26th day of August, 1920, there was duly filed in the District Court of the United States for the District of Washington, Southern Division,

in words and figures, as follows, to-wit:

(Title Omitted)

Be It Remembered, That heretofore and on the 29th day of October, 1919, the above entitled matter coming regularly on for hearing before the Honorable E. E. Cushman, one of the judges of the above entitled court, and

The Plaintiff being present in person and represented by her attorney, Wm. P. Lord, Esq., and

The Defendant being present in person and represented by his attorneys, Roberts & Skeel,

The following proceedings, among others, were had and done, to-wit:

Kathryn Stuart

DIRECT EXAMINATION

BY MR. LORD:

Q. Where were you born?

A. In Clark County, three miles and a half from Vancouver.

Q. What was your maiden name?

A. Kathryn Anderson.

Q. What was your father's name?

A. William Reese Anderson.

Q. Did he take a donation claim, donation land claim in Clark County?

A. Yes, sir.

MR. ROBERTS: I think that is all immaterial. The property was hers, she deeded it.

COURT: It is answered. There is nothing before the court, except you sounded a warning to counsel. There is nothing for the court to rule on.

Q. Mrs. Struett, you were raised in Vancouver, were you?

A. Yes, sir.

Q. How old are you now?

A. Forty years of age.

Q. Are you acquainted with the defendant or respondent, Harry Hill?

A. Yes, sir.

Q. How long have you known him?

A. About seven years.

Q. When did you first come in contact with him?

A. 1913, I think that was, the 1st of May.

Q. Where did you meet him?

A. Where did I first meet him?

Q. Yes.

A. Rainier, Oregon.

Q. What was his business?

A. Well, he was a mechanic.

Q. What was his business?

A. Same as it is now.

Q. I wish you would talk louder.

A. He was a mechanic and worked at Altoona when I first met him, where he is now, the last I knew of him.

Q. Was he in prosperous circumstances?

MR. ROBERTS: That is objected to, as immaterial.

THE COURT: Overruled.

A. I guess he did.

Q. What is that?

A. Beg pardon.

Q. Was he in prosperous circumstances?

A. Evidently he was.

MR. ROBERTS: She said he was a mechanic.

WITNESS: He seemed to be.

COURT: That is very indefinite.

Q. I will ask you what his circumstances were?

A. I did not know his business thoroughly, you know, but he always seemed to be in good circumstances as far as I know.

Q. Was he married at the time you met him or not?

A. Well, yes he was married.

Q. Was his wife living with him or not?

A. No.

Q. Do you know whether he had been divorced from his wife?

A. No, sir.

Q. You do not know?

A. I do not know, because he said not.

Q. He told you he was not divorced?

A. Yes, that is what he said.

Q. When did he inform you he was not divorced from his wife?

A. Well, as soon as I met him, that is right after.

Q. How long did your acquaintance with him continue?

A. Well, from the time I met him, February '18 he was at my house.

Q. During that time what representations if any did he make with respect to his marital status?

MR. ROBERTS: I object to this as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

Q. What did he say with respect to whether he was married or not?

A. Well, in regard to marrying me he said he could not until he got a divorce, and he was not divorced yet.

Q. Did that in any way effect your relations with him?

A. Yes, certainly did, because I treated him as an honest, up-right man in every respect, as much as I would my father or my brother.

Q. What did he say in respect to that? Going back to the first part of your relations, what did he say in respect to eventually marrying you?

A. Well, in regard to the home, I never asked him to lift the mortgage at all.

A. I am not talking about the mortgage at all.

A. I know, but I am trying to there———

Q. I mean in respect to your relations with him, what did he say about marrying you?

MR. ROBERTS: I object to that as incompetent, irrevelent and immaterial.

THE COURT: Overruled.

Q. Go ahead, what did he say with respect to marrying you, during any time of your relations, between the 13th and 18th?

A. He wanted a place to make a home for us, when he got it so that he could marry me.

Q. So that he could marry?

A. Yes.

Q. Did he represent to you that he would eventually be in a condition where he could marry you?

A. Yes, sir.

MR. ROBERTS: I object to that and ask it to be stricken.

THE COURT: Objection sustained; too leading.

Q. Mrs. Struett, you testified that you got in touch with Mr. Hill in 1913?

A. Well, it was 1915 when he had the mortgage——

Q. Anterior to the time he paid the mortgage, what were your relations with him?

A. The same as it continued until 1918, in February.

Q. How long had you known him when the mortgage was paid?

A. Nearly two years.

Q. Where were you living in 1913?

A. Rainier.

Q. How long did you live there?

A. Well, about a year, about in the neighborhood of a year.

Q. When you left Rainier where did you go to?

A. Aberdeen.

Q. In this state?

A. Aberdeen, Washington.

Q. How long did you remain there?

A. Well, in the neighborhood of a year.

Q. Where was Mr. Hill in the meantime?

A. Well, he came down to Aberdeen on his way East.

Q. How often did he see you while you were in Aberdeen?

A. Once—twice.

Q. Came to see you twice?

A. Yes.

Q. What year was this in?

A. 1914.

Q. During this time was he friendly with any other member of your family?

A. Yes, very good friends.

Q. With whom?

A. With my sister and brother-in-law, good friends

Q. How intimate friends was he with your sister?

A. Well, supposed to be a gentleman. They understood him as a gentleman, a friend; we spoke of him as a friend.

Q. Your sister married at that time, Mrs. Struett?

A. Yes, sir.

Q. What were your relations up until 1914?

MR. ROBERTS: I object to that as indefinite and undertain.

THE COURT: Objection overruled. Answer.

A. Well, same as when I met him.

MR. ROBERTS: I do not understand you.

A. Well, from the start always the same until he got married.

Q. How intimate were you with him, explain that to the court?

A. Well, not any more than a wife, ——that is everything I guess.

Q. You mean to say from the start——

MR. ROBERTS: I would like to have it understood that all this line of examination is over my objection. I do not think all this should go into this case.

THE COURT: It will be so understood. After this last answer there is no use going into particular details of that relationship, except the period over which it extended, as far as this case is concerned.

Q. How often did you see him in 1915?

A. About sometimes every two weeks, not longer than three.

Q. Where were you living?

A. In Vancouver, out on the old homestead.

Q. And where was he living?

A. Cascade Locks, Oregon.

Q. He came down to see you about once in two weeks?

A. Yes.

Q. What did he do in respect to supporting you, if he did anything?

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial, not an issue under the pleadings.

THE COURT: Well, I understand that, but the objection will be overruled. Answer.

Q. What was he doing in the way of giving you money or anything of that kind?

A. Well, he gave me a few dollars, yes, when he would come down.

Q. How much would he give you at a time?

A. At that particular time not more than ten dollars, not more than ten.

Q. Were you sleeping with him at that time?

A. Yes.

Q. How often did he make you these gifts?

A. Well, not very often, except——I never put that down. I do not know just how often he did.

Q. What were your feelings towards him?

A. Just like I would a husband.

Q. How is that?

A. Just as I would my own husband, everything, everything in the world.

Q. Did that in any way cause you to perform or do any act showing any particular confidence in him?

A. Yes, because I thought he was a gentleman, meant every word he told me about what he intended to do.

Q. What did he tell you during this time?

A. Well, to have a home, and he wanted to clear the

land up there and everything and make a home of it.

Q. (By the Court) Clear it, what you mean, clear the deed?

A. No, not the indebetness, but part of it is unimproved you know.

MR. ROBERTS: I am not sure, I understand it to mean clear the stumps?

A. Well, it is not clear.

Q. (By the Court) When you used the word "clear" you mean to improve the land?

A. Yes.

Q. What indebetness was against this property?

A. Five hundred dollars.

Q. What was done about this mortgage or indebetness?

A. Well, he paid it off, that is all.

Q. Paid it off you say?

A. Yes, he paid the mortgage.

Q. Did any one request him to pay the mortgage?

A. No, sir, I did not. I never asked him, not for a five cent piece, never.

Q. What did he say about it to you when he paid it?

A. What did he say about it?

Q. Yes.

A. Well, I was a widow at the time and he told me not to worry about anything. I didn't have any income in any way, and he told me not to worry at all, he would see that it was all right, and he cleared it for me, absolutely. I did not want him to have anything to do with it at all, and I wanted to give him a mortgage on it, and he did not want it. This $250 that he loaned me, I wanted to give that back to him, and he says, no, he says, keep it, you may need it. I offered that to him three or four times, because when I sold the rooming house I wanted to pay him back the money he had loaned me on that.

Q. (By the Court) You say when you sold the rooming house?

A. Yes, sir, that is the money he had loaned me, that if that $200. It was $150, is what he gave me.

Q. How much did he give you?

A. One hundred and fifty dollars.

Q. What became of the promissory note that evidenced this obligation?

MR. ROBERTS: You mean on the land?

A. I think Mr. Hill has it.

MR. ROBERTS: Yes, we have it.

Q. Did you give him any evidence of indebtedness of any kind for paying this mortgage off, any note or security?

A. No, sir.

Q. What?

A. No, sir, he would not accept any.

Q. And what did he tell you the purpose of paying it off was?

A. For myself.

Q. As what?

A. As a gift I suppose, that was all. He would not receive anything, would not even take a mortgage on it.

Q. This was in what year?

A. This was in 1915.

Q. Where were you residing then?

A. Vancouver.

Q. How often had you seen him at the time this Kramer mortgage was paid off?

A. How often?

Q. Yes.

A. About three weeks.

Q. Over a period of six month's time how often would he come in to see you?

THE COURT: The witness said about once in two weeks during 1915, already.

MR. ROBERTS: She said she saw him twice during the year while she was in Aberdeen.

THE COURT: Yes, that was in 1914 she said.

Q. After paying off this mortgage, how long did you continue to associate with him?

A. Until,——well, he went to Idaho before he came to see me in Portland, in February, 1917.

THE COURT: The question is not answered yet.

A. He was in Idaho before he came, whenever he come.

Q. This association was continued until when?

A. Well, up to the time he was married; just a few weeks before he was married.

Q. (By the Court) Have you changed that to weeks?

A. Yes, because he went to California in February, he went to California, and if I understand it correctly he was married in May or April, 1918.

Q. (By the Court) You change a few weeks to a month, do you?

A. Yes.

Q. You deeded this property at what date?

A. I could not tell you that exactly.

MR. ROBERTS: I have the deed here. (Hands deed to Mr. Lord).

Q. I hand you the deed, Mrs. Struett; is that your signature?

A. Yes, sir. He told me when I made that out, he says, make it out exactly as the deed you have yourself, you have the original and he says, you can keep the original, but have a deed made out just the same as the one you have.

Q. What purpose was this deed for?

MR. ROBERTS: I object to it.

THE COURT: You can say what was said.

MR. LORD: That is probably asking a conclusion. I will withdraw that question. What was said at the time of making this deed?

The deed was offered and received in evidence, and marked as Plaintiff's Exhibit 1.

A. He kept it quite a while before, and I do not know just when he had it recorded, but he never would have it recorded; he said it was for me alone, that was why he paid the mortgage off; so that I could have the home.

Q. How long after paying the mortgage off was this before——

A. How is that?

Q. How long after paying off this mortgage was this deed made?

A. Oh, that was paid in '19, and near 1917, I think —in the year 1917, I think the latter part of it, if I am not mistaken.

Q. What did he say, what representations or state-

ments did he make to you that induced you to make that deed?

A. He just says that I could have it for myself and that we would make a home of it, that there would not be a squabble over the property and we would have a home some day.

Q. Did he say anything in respect to the payment of this Kramer mortgage?

A. No.

Q. Your relations, after payment of this Kramer mortgage, became more difficult or not?

A. How is that?

Q. Were your relations after the payment of this Kramer mortgage changed?

A. Just the same.

Q. Did you see him more often?

A. No, not more often, whenever he could get away from his work to come to see me, that was most every two weeks.

Q. And where were you living then?

A. Part of the time I was living at Vancouver and part of the time in Portland.

Q. Did he ever hold you out as his wife?

A. Yes, sir.

MR. ROBERTS: We object to that as incompetent, irrelevant and immaterial, calling for a conclusion.

MR. LORD: The purpose of it, your honor, is to show the relationship between these parties, so as to throw some light upon the purpose of this conveyance to him, her trust and confidence in him.

THE COURT: If you brought somebody else here to show that he had acknowledged it, it might be corroborating evidence, but after what the plaintiff has said--

THE WITNESS: We have been registered as man and wife in Portland.

MR. ROBERTS: I ask that that be stricken.

THE COURT: Motion denied. This is being tried before the court. Unless dispute arises over that phase of the case why it does not add anything more. She has said enough to show the intimacy of the relationship. To go over the details of it does not add anything to it so far as helping me in this case is concerned. After what she has said if they registered in a hotel as man and wife it would not help me any more in determining whether this was a mortgage or whether it was a gift,—if they registered in one or did not register at all. Of course if it was disputed that was the relation-

ship that might be sustained.

Q. You were intimate together?

A. Yes, sir.

MR. ROBERTS: I object to that.

THE COURT: I do not think you need pursue that any further. You have made it about as strong as you can. She said they were no more intimate than man and wife. I do not know what advantage there is in ringing the changes on these details.

Q. How long did that intimate relation exist? Never mind, I will withdraw the question. That is all.

CROSS EXAMINATION

BY MR. ROBERTS:

Q. Now then, Mrs. Struett, you had a sister living at Rainier, Mrs. Kappel?

A. Yes.

Q. Mr. Hill boarded with your sister?

A. Yes.

Q. At Rainier, Oregon?

A. No, when I was there, no he did not.

Q. That is where you met him?

A. I met him there, but he was not boarding there. He was living at Altoona when I met him.

Q. You met him at the home of your sister, Mrs. Kappel?

A. Yes.

Q. That was in 1912?

A. In the latter part, yes in June.

Q. In June, 1912?

A. Yes, sir.

Q. Now, you at that time were Mrs. Smith?

A. Yes.

Q. And Mr. Smith was there, you were living with your husband?

A. Yes.

Q. Now, then, you say that Mr. Hill told you that he likewise was married?

A. We were.

Q. That he was likewise married, that he was mar-

ried,——that is what you said he told you?

A. Well, he had been, but he had not been living with his wife for about 11 or 12 years, probably longer; just what time I do not know, but a number of years.

Q. I understood you to say that you understood he was a married man?

A. He was, but left his wife, but not divorced, so he told me.

Q. You knew then that if he was a married man and not divorced, he could not marry you, didn't you?

A. Well, but he always said that he could any time he wanted to.

Q. And you knew that you were a married woman, living with your husband, and could not marry, didn't you?

A. Well, Inever expected to at that time, never thought of such a thing.

Q. Now, this intimacy that you have stated existed between you and Mr. Hill was begun while you were a married woman living with your husband, didn't it?

A. Well, it was only about a month that my husband was alive he ever knew him or saw him.

Q. When did your husband die; 1914, didn't he?

A. Yes.

Q. And your relationship with Mr. Hill began in 1912?

A. Well, that was in the latter part, you understand.

Q. Latter part of 1912 and your husband did not die until 1914?

A. Yes.

Q. So during all of that period you did not of course think about marrying Mr. Hill?

A. Why, I certainly did not.

Q. Now Mr. Hill was a working man?

A. Mr. Hill was a working man?

Q. Yes.

A. I guess he was, yes.

Q. And then later you went to Aberdeen because your sister

Q. And you were there a year?

A. About a year, yes.

Q. And during all that year Mr. Harry Hill only saw you twice, you say?

A. Well, he came there on his way East, and then he came down there and brought me back up to Vancouver on Christmas day that same year.

Q. Now, that time when he was on his way East, at Aberdeen he loaned you, did he not, $83 to pay interest on the mortgage on that land?

A. Yes.

Q. That is correct?

A. Yes.

Q. Interest had defaulted?

A. He gave it to me. I never asked him for it.

Q. That was when you got the first money any how?

A. Yes.

Q. Now that is at Aberdeen, on his way East, when he came through Aberdeen?

A. Yes.

Q. And he was merely off there how long,—just

simply stopped off on his way East, didn't he?

A. Few days, yes. Came that way, he said, purpose to see me, that is what took him on that route.

Q. I didn't catch that last remark.

A. He came that way purpose to see me.

Q. I heard that.—but did you get it, Mr. Reporter?

REPORTER: That is what took him on that route.

Q. He was working over at Altoona, Washington, as a mechanical engineer, was he not?

A. Yes.

Q. And then he got the job up at Cascade Locks?

A. Well, I do not know just when he got that position up there.

Q. It does not matter?

A. He went there, yes.....

Q. That was where he went next, was it?

A. Yes, as far as I know.

Q. Now, in the meantime you had gone to Portland,

was that the idea?

A. From Aberdeen?

Q. Yes.

A. No, sir.

Q. Where did you go.

A. Vancouver.

Q. Vancouver? Well, you went to Portland later?

A. Yes.

Q. Now you say that once in two or three weeks he would come down from the Locks?

A. Well, he came down every opportunity he could away from his work.

Q. It was only when he could get away from his work as a rule that he was down at all, was it?

A. Well, I don't know what you would call that. He said sometimes he left his work to come to see me.

Q. Then he went over to Idaho. How long was he over in Idaho?

A. Well, I would have to, I could not tell you exactly how long that was.

Q. He did not come to see you while he was in Idaho, did he?

A. I don't just know whether——yes, he came to see me, but whether he went back or not, I do not know.

Q. That is what I mean, did he come over from Idaho and then go back?

A. Well, I will have to think about that.

Q. Better think it over?

A. No, I think he stayed.

Q. What?

A. I think that he stayed.

Q. Then he stayed when he came back?

A. I think so, yes.

Q. Then he didn't come from Idaho to see you?

A. He came here and came back to be near me, that is what he said in his letters.

Q. Well, then, he went to California and was down there three months?

A. Well, he went in February, I think about the 25th of February, along in there sometime.

Q. He didn't come back from California while he was down there, did he?

A. Not until he came up here and married this lady that is his wife now.

Q. Well, you are even, you were married, too?

A. Yes, but he promised me he would never marry anybody.

Q. You were married first?

A. No.

Q. You beat him to it, didn't you?

A. No, sir, I did not. I never knew he was married until a year later.

Q. Now, you say that at this time when he came to see you he always gave you some money, about ten dollars?

A. Over $5.00. Sometimes he did and sometimes he did not.

Q. Then he paid for what he got each time, didn't he?

A. Well, I—

MR. LORD: I think that's a conclusion.

COURT: Objection sustained.

Q. Well, now, you and Mr. Hill never at any time lived together, did you?

A. Well, I don't know what you would call it. He claimed my home as his home whenever he came to Portland. He called it his home. He made it his home.

Q. You mean he went to your room to see you?

A. Certainly that was his home. Whenever he came over from the Locks or wherever he was, that was his home when he came to Portland.

Q. He never maintained at any time any place any kind of an establishment?

A. In Portland?

Q. Or any place, yes?

A. I hardly know what you mean by that. He did not stay at any one of the hotels as long as I had the rooming house; he made it his home the same as a husband would.

Q. When you bought this rooming house you run that?

A. Yes.

Q. And you were arrested a couple of times for lewd conduct while you were running it, weren't you?

A. No, sir.

Q. What were you arrested for?

A. I was not arrested at all.

Q. You say that you were not?

A. No, sir. Running that rooming house? No, sir.

Q. You were not arrested in the apartment, in Portland?

A. No, sir, never.

MR. LORD: I object to that as immaterial, unless it is a felony. If it is merely a matter of sporting house stuff, I object as not material.

COURT: She denies it, and objection overruled.

Q. Now, let's see if there is some misunderstanding?

A. There must be some misunderstanding.

Q. Now, you were living there in the rooming house with Mr. Struett, whom you have since married?

A. No, I beg your pardon.

Q. He was there?

A. It does not make any difference. He was paying for his room the same as the other roomers were.

Q. Do you men to say that you and Struett were not arrested?

A. Yes, I do.

MR. LORD: I object to this question.

A. Yes, sir, I do, emphatically.

MR. LORD: Whether this was before or after this conveyance would make a difference. If it was after and subsequent to this conveyance, it could not throw any light upon this transaction whatever.

THE COURT: Objection overruled.

MR. LORD: Exception.

Q. Well, was he arrested?

A. No, sir.

Q. Neither of you?

A. No, sir.

Q. Well, you don't know—

MR. LORD: I object and move to strike out whether or not Mr. Struett was arrested. It has no bearing on the question of whether this conveyance was a gift or not, or what the situation was between the plaintiff and defendant.

THE COURT: Motion denied, anything affecting the credibility of the witness would be proper.

MR. LORD: Exception.

WITNESS: I am telling the truth about it.

MR. LORD: I do not see what the moral or sexual relations have to do with the credibility of the witness. It might show that they are not the people they ought to be, but it has nothing to do with their truth and veracity.

THE COURT: It might have. Objection overruled.

Q. When were you married to Struett?

A. It will be a year the 31st of this month.

Q. That would be the 31st of October, 1918?

A. Yes, sir.

Q. Now, when did you get this rooming house?

A. In 1916.

Q. That is in Portland, is it?

A. Yes.

Q. When did Mr. Struett begin to live at the rooming house?

A. Now, I think that was in November, November or latter part of October.

Q. 1916?

A. Yes.

Q. (By the Court): What time in 1916?

A. Either the latter part of October—

COURT: That is the way I understood it.

Q. Now, Mrs. Struett, as to this mortgage which he paid, do you know how much he paid?

A. Well, no, I could not say just exactly. I never kept a—No, not right now, I could not say.

Q. You do not know how much he paid to have that transferred?

A. Do you mean by the month or altogether?

Q. No, I mean what he paid to satisfy the mortgage. Mr. Hill is not claiming anything here at all for the

money he gave you, the five and ten dollars you are talking about; we don't claim anything for them. I am talking about the money he paid for the mortgage. You do not know how much he did pay?

A. Well, he paid it himself. It was five hundred dollars and what there was due—

Q. You said he paid it in 1917?

A. Oh, no, I said he paid it in 1915, was when he paid the mortgage—1915.

Q. You said once he paid it in 1917?

THE COURT: I think he paid it in 1915 and got the deed in 1917.

MR. LORD: 1916.

Q. Now, you knew that mortgage was being foreclosed?

A. Yes.

Q. And that in order to redeem or pay that he had to pay the accrued interest and court costs, attorney fees and back taxes with penalty and interest?

A. Well, the taxes—yes, that is right.

Q. And if he says that he paid $801 to satisfy the

whole thing, you do not know whether that is correct or not?

A. No, I do not.

Q. Now, then, about this money which he loaned you at the time you bought the rooming house, you said once $250 and once $200 and once $150. Now, which was it?

A. It was $150 he gave me. The rooming house cost $300 and he gave me $150.

Q. You claim that he gave you that?

A. That he gave me, yes, sir.

Q. $150.

A. Yes, sir.

Q. At the time you gave the deed you received back a written agreement, didn't you?

A. No—Of what?

Q. About the purpose for which the deed was given?

A. No, sir.

A paper is marked for identification as Defendant's identification "A."

Q. I hand you this instrument marked Defendant's identification Exhibit "A" and ask you to look at that and state if you did not receive that instrument or an exact duplicate of it?

A. I think you have it (referring to Mr. Lord). This was given to me I think just before he went to California.

Q. Just before he went to California?

A. He mailed it to me when he was living in Portland.

Q. You received it?

A. But he never kept his word. When I made the trip down to see him, to pay the $500 in cash, when he wanted $1,000 to call the deal square. I said, all right, I'll pay you $500 and may be the next day I will give you the balance and settle it for a thousand dollars, and the man promised to me in the bank on Monday, and I went there I don't know how many times and he never was there, and not a paper of any kind, and I have nothing, not a thing, after he made me this promise. I had the $500 to pay the cash.

Q. And the balance of the thousand you were going to pay later?

A. I could have had it the next day as I told him. I

think you have the duplicate of this (addressing Mr. Lord).

MR. ROBERTS: (addressing Reporter) Did you get her statement, the attorney had the duplicate of that Exhibit A? I offer this in evidence.

THE COURT: It will be admitted.

MR. LORD: I object to that. He is only offering the copy and he admits in open court I have the original.

MR. ROBERTS: Excuse me. Give me the original please.

THE COURT: You are offering the original? (Mr. Lord placed paper on table before court).

MR. LORD: I am not offering anything. I am producing the original.

THE COURT: You are demanding the original? (Mr. Roberts took up papers produced by Mr. Lord).

MR. LORD: Don't remove those papers. Those papers belong to me.

MR. ROBERTS: I withdraw the copy and offer the original.

THE COURT: The copy being withdrawn, the

original produced by the plaintiff is admitted.

MR. LORD: No objection to the admission of the original in evidence.

THE CLERK: I will mark this "A" just the same as the other.

Paper received in evidence and marked as Defendant's Exhibit "A".

THE COURT: The consideration is set forth in the deed, is it?

MR. ROBERTS: Yes, sir. The deed was not offered in evidence. It has been marked as Defendant's Exhibit. I will offer it in evidence because of that fact.

THE COURT: It is admitted.

Thereupon said Deed was marked as Defendant's Exhibit.

MR. ROBERTS: The consideration named in the deed is $1000, and that instrument (Exhibit A) says the consideration named in the deed with other indebtedness, such as taxes and assessments; and that is all we are claiming here in this action, is this amount named in this deed with interest and taxes paid by Mr. Hill. That is all.

THE COURT: The $801 you mentioned a while

ago were made up from what then?

MR. ROBERTS: The money he loaned to buy the apartment house.

THE COURT: That testimony is not in, your testimony on that point has not been put in. She says $150.

MR. LORD: She says $150 and he says it is $200.

MR. ROBERTS: Oh, no; the interest would make it more than that.

THE COURT: This is December 22, 1916. How long would that be after the redemption.

MR. ROBERTS: To fix that I will offer this mortgage at this time.

THE COURT: Admitted.

Thereupon said mortgage was marked as Plaintiff's Exhibit "B."

WITNESS: May I see the deed there?

MR. ROBERTS: Now the date of the satisfaction of this mortgage, if the court please, is the 22nd day of October, 1915. I was mistaken when I said in the opening to your honor—you asked whether this was for money that had been advanced or subsequent advances. It had all been advanced except the taxes since paid.

MR. LORD: I move to strike out the statement of counsel with respect to the affirmative defense.

THE COURT: There is nothing except withdrawing the statement already made.

WITNESS: It is recorded 1917, June 6th, but where does it say for the indebtedness, where does it say—

COUNSEL: Right here (indicating).

WITNESS: Well, he has had that put in there, because we never put it in the deed at all, never. There was nothing like that in the deed, not a thing.

Q. You are holding the deed in your hand?

A. Yes.

Q. Now, you don't remember anything about that? That has not anything of the appearance of having been inserted there?

A. Why, right here, yes.

Q. Well, what I mean it is over your signature?

A. I never put that in there.

THE COURT: Be fair to the witness. I think the question should be if there is any misstatement, and if so

she can call attention to it.

A. I don't quite understand it.

Q. We will put it as the court suggests. Is there any misstatement in that letter?

A. I really don't know how to answer that.

Q. Well, that letter is dated on January 22, 1919; that is January 22 of this year. You knew the facts as well then as you know them now, didn't you?

A. Not altogether, no.

Q. Well, now, would it be any different. You started suit immediately after this letter was written, didn't you?

A. Yes.

Q. I don't mean immediately—

A. Yes, I understand you.

Q. I will get that date. This copy I have here does not give the date. On March it was filed; March, 1919, the suit was filed. I do not know when it was verified. So that within a short time after that you started this action. You had not seen Mr. Hill in the meantime, had you?

A. Since the suit was filed?

Q. Between the time that this letter of January 22 was written and the time the suit was filed?

A. January 22?

MR. ROBERTS: Has your honor the complaint before you there? Will you kindly look at the date of the verification, or let me do it?

THE COURT: On the 18th day of March, 1919.

Q. On the 18th day of March, and this was January 22. It was not less than 60 days after this letter was written that you started this action. Now, in the interim, between January 22 and March 18, you did not see Mr. Hill?

A. I think I did.

Q. You think you did?

A. I think then is when I saw him and went down to straighten the matter up with him. Yes, right away after that.

Q. Then you went after this letter was written to see him in order to settle with him?

A. Yes. Yes, sir.

Q. It was then that you say that you were willing to pay a thousand dollars?

A. Well, just as I said before; I did not want to bring anything into court, but I could not see where he was entitled to a thousand dollars, and I did not know what it was for, but in order to make everything nice and agreeable why I would do the best I could.

Q. Well, at that time you told him, did you not,that you thought he had paid only $500 to satisfy the mortgage?

A. I never said anything to him at all about it.

Q. You never said that?

A. No, sir.

Q. That was what you thought, you thought he was charging you too much?

A. I could not see where he got that $1000.

Q. You don't see now where he got the $100?

A. No, I do not.

Q. Where he gets the $1000?

A. No, sir.

Q. Then that was the trouble between you about the settlement, was it—you thought he was charging you too much?

A. Well, yes, because he should not charge me anything. I could not see it that way. I never asked the man to do that for me or anything, but at that I was willing to make things right for the man, but he never had it that way, and it shows you there on that deed, or I would have had some kind of paper to show, wouldn't I?

Q. When you wrote and asked him how much you owed him he came right back very frankly, did he not, in this letter of June 28, and told you that while he had advanced more than $1000 if you would pay him on or about January 1, which was six months later, $1000 would settle the whole thing?

A. Well, I have explained why I did that.

Q. Now, let's see, that letter of his was July 28, 1918; your letter asking him how much you owed him was prior to that.

A. I never knew it was there, that amount, that indebtedness, never knew it was there. It is new to me. The deed should be the same as the original, just exactly the same as the original deed, only H. B. Hill.

Q. Well, you mentioned that a while ago and I did not think it was worth while?

A. That was why I could not understand.

Q. I think we better clear it up now. When you say

the original I understand you to be talking about the deed you received from your mother.

A. That is the one I am talking about, that is the original deed, the one I told him to copy, to have a copy made, and that is the copy, but there was nothing in it like that, because I never knew anything about it, what that indebtedness would be.

Q. Just a moment ago you said you were trying to pay him a thousand dollars and you had $500 all ready and wanted to give it to him and pay the balance later, and he would not take the money.

A. Well, gracious, that was just a few months ago when I went to see him. I do not remember just the date. Later on he wrote to me and asked me if I would pay it. I thought instead of bringing it into court I would pay him a thousand dollars. I had $500 in cash. I went to him at Altoona and he had promised to have the deeds in the bank for me on Monday and there never was anything, never.

MR. LORD: I think that is the letter she referred to? (Counsel handed letter to Mr. Roberts).

Q. I hand you this letter marked defendant's exhibit "C" and ask you if this is the letter to which you referred several times, that he wrote you in January of 1919?

A. No, there is another one. This is the answer to

the letter that—

Q. That is Mr. Hill's letter?

A. Yes, sir, that is Mr. Hill's letter.

Letter offered and received in evidence marked Defendant's Exhibit "C."

(Exhibit "C" read to the witness).

Q. He starts this letter off by acknowledging the receipt of one from you inquiring how much you owed him?

A. All right. Mr. Lord has the first letter, and that is the answer to a letter I got from him when he wrote to me while he was here in Portland.

Q. If this was a gift why did you write and ask him how much you owed him?

A. Well, if I could get that letter and explain to you it would be perfectly plain.

MR. ROBERTS: I offer this letter in evidence.

MR. LORD: (To witness): Which letter do you refer to? Do you refer to a letter you wrote or a letter he wrote you?

WITNESS: Well, first where he wrote me that let-

ter and also a piece of poetry from the Broadway Hotel.

MR. LORD: I was going to clear that matter up on re-direct examination.

Q. Mr. Lord has been representing you in this matter how long?

A. Well, I don't just remember.

Q. Well, you saw him about this matter along about the time of these letters?

A. Yes.

Q. And you told him what the facts were?

A. After he did not keep his agreement with me, after I did not get anything, any deeds or anything, then is when I consulted Mr. Lord.

Q. Up until you consulted Mr. Lord you wanted to pay it?

A. I would to avoid the necessity of coming into court.

Q. Now, when you went to Mr. Lord you told him the facts, didn't you?

A. Well, I did not tell him only what I should have told him.

Q. Well, you went—

A. I have told the truth in everything I have told, but not near really what I should have told him.

Q. After you went and told Mr. Lord the facts, he wrote a letter representing you, did he not. (Counsel referred to a paper marked for identification Exhibit "D"). Will you admit, Mr. Lord, you wrote the letter?

MR. LORD: I will not make any admission. No, I will not admit I wrote it.

MR. ROBERTS: May I have permission to withdraw this witness for a moment? Mr. Lord, will you be sworn? I would like to have Mr. Lord sworn.

MR. LORD: I don't care to testify at this time—the witness is on the stand.

THE COURT: I think if Mr. Lord objects, you will have to finish with the witness.

MR. ROBERTS (to Mr. Lord): Well, I will hand you this letter that is marked Defendant's Exhibit "D" and ask you to just read that if you will.

Q. Now, Mrs. Struett, Mr. William P. Lord, whose name appears at the bottom of this letter is the same William P. Lord who is in court representing you as counsel?

A. Well, I don't know that.

Q. You don't know that?

A. I do not know it.

Q. Do you know any way we could prove it?

A. No, sir.

Q. Well, are the facts stated in that letter correct?

A. I did not write the letter. I do not know anything about it.

Q. The question is are the facts stated in that letter correct? You know whether they are or not?

A. I don't know anything about them because this is the first time I have seen the letter.

Q. They are all facts pertaining to this very case and a statement in relation to your claims and contentions, of what the facts are about this transaction. Are they correctly stated in that letter?

A. Well, I will leave that to Mr. Lord. I do not know.

Q. You decline to answer?

MR. LORD: It calls for the conclusion of the witness, whether it is correctly stated or not.

Q. Now, you had this letter in your possession all that time, from July 28, 1918, until you started this suit and yet you never at any time questioned the fact that you owed him this money, did you?

A. Why, no.

Q. Now, then, this paper that is marked Exhibit "A," which we call a defense or an agreement on his part to reconvey this property to you—you had that all the time in your possession?

A. Well, he sent me this, but he dated this back, though, mind you.

Q. I will get to that.

A. Yes, he dated this back to the year '16, when it was sent to me in '18.

Q. When I said we would come to that, I did not mean that. I was going to ask you about the date?

A. He dated that back to 1916.

Q. You had that any way since the time it came in your possession and produced it here in court, didn't you?

A. Yes, but not since 1916 I haven't had it.

Q. Let's see—

A. Get the enevlope, there is where you will have the date.

Q. You stated to your own counsel here that you had the deed in your possession sometime after it was actually made, before it was delivered, did you not?

A. Why, I had the deed, yes.

Q. You had this deed before it was delivered to Mr. Hill?

A. Yes.

Q. Now, the deed—

A. I had it from 1915 to '17.

Q. Let's see about that, let's get at the facts. You have stated all the time that this deed was made in 1916, haven't you? And isn't it dated on the 10th day of August, 1916, right down here? Now, turn it over. That as you see is regularly acknowledged before a notary public who certifies that on the 10th day of August, 1916, you came before him and acknowledged the execution of the deed?

A. In 1916?

A. Yes.

A. That was even the following year. I had it before he asked me to let him take it.

Q. He paid the mortgage on the 20th day of October, 1915. Now, then, when did you buy that rooming house?

A. In June, 1916.

Q. In June, 1916?

A. Yes, sir.

Q. So that he had given you all of this money—

A. Before the deed.

Q. Yes. He had loaned you all of this money prior to the date of the deed, hadn't he?

A. He did not lend it to me at all.

Q. Well, you got it?

A. I did not ask him for it.

Q. You got it?

A. Yes, I got it, but I did not ask him for it.

Q. It is a fact you got it?

A. $150, yes, sir, for that rooming house.

Q. So whatever amount Mr. Hill paid to satisfy that mortgage on your property and whatever amount

he had advanced to you for the rooming house, was pri to the date you executed this deed?

A. Yes.

Q. Now, then, while you executed this on the 10th day of August you think you did not deliver it until later. How much later, would you say?

A. When did he have that recorded? If I got it on the 10th day of August when was it recorded?

Q. Well, I have no objection to telling you when it was recorded.

A. Well, when?

Q. It was filed for record on the 6th day of June, 1917. You see that is on the back of it, that is all I know.

A. Why did he put it off so long?

Q. That I do not know. I only asked you when you gave it to him. You do not mean to state, do you, that you held it or did not deliver it until June, 1917?

A. Well, there are so many funny things about that deed, I could not tell anything about it.

Q. Well, this is the contract which he gave you, which says he held it as security, and that is dated De-

cember 22, 1916.

A. Well, it was not anything of the kind, then.

Q. Well, now, isn't that the time when he got the deed exactly?

A. Well, that does not make any difference. It was not when he mailed me this letter, and I think Mr. Lord can tell you something else. That is just before he went to California here last February.

Q. You said he went to California in February?

A. Yes.

Q. And this is dated December 22?

A. Well, that is all right. He dated it back, didn't he?

Q. Well, I do not know.

A. Well, I know.

Q. Now, counsel in his opening statement said that you had inherited this property, but as a matter of fact you received it by a deed, did you not?

A. Yes, sir.

Q. And you got that deed in nineteen hundred and when?

A. Nineteen hundred and ten.

Q. Now, since 1910, when you acquired the title of this property, you have never paid any taxes on it?

A. Yes.

Q. When did you pay taxes?

A. I can not tell you just when, but I think you can find receipts where I paid it.

Q. Well, I would like for you to find them.

A. I cannot tell you just the dates.

Q. If you contend you paid any taxes on this property since the time you acquired it, I would like to have you try to give us some date, some year. You say you paid them? Did you pay them once a year, or more?

A. I think that is the way they have been paid all the time, if I remember.

Q. Well, now—

A. I went to the court house with him in February when he paid the taxes, the last taxes.

Q. Well, he paid them with his own money, didn't he?

A. Why, yes, he paid them with his money.

Q. That is what you meant to say when you said that you had paid them, you meant you paid it with Mr. Hill's money?

A. Well, I would consider it my own for that matter.

Q. Put it this way, it was money that came from Mr. Hill?

A. Yes.

Q. So that all the money that has gone in the taxes for this property then, since 1910, was Mr. Hill's money at some time?

A. Oh, I do not think, not quite all, since 1910, but I would have to look back a little bit to find all of them.

Q. Put it this way, the taxes at the time he paid the mortgage were in default, you know that, don't you?

A. No, they were not. In default?

Q. Yes.

A. When I got this property?

Q. At the time the mortgage was foreclosed.

A. No.

Q. You do not think so?

A. No, sir.

Q. You do not know, do you?

A. Well, I think when the second mortgage was made the taxes were paid then.

Q. What is that?

A. They were kept up, the taxes were kept up then when Mr. Kramer took the mortgage.

Q. At the time Mr. Kramer took the mortgage?

A. Yes. It is since 1915, since he has paid the taxes, Mr. Hill.

Q. All right. Mr. Hill has paid them since 1915, that is all right. Well, then, the Kramer, Mr. Struett, was given in 1912?

A. Well, I mean, yes; I was thinking of my deed, my deed from my mother was in 1910.

Q. So that Mr. Hill has paid the taxes since 1912, hasn't he?

A. Yes, sir, that is right.

MR. ROBERTS: If the court please I was not counsel in this matter handling it originally. It was handled by counsel in Portland. In the answer they set

up only one year's taxes, and I would like to ask to amend to set up the payment of two additional years' taxes there. There is apparently no question about the fact that Mr. Hill paid them. We have receipts for them right here, as a matter of fact. I am not in a position myself to state just how the mistake occurred. They set up only the one year's taxes instead of three years, subsequent to the transaction.

MR. LORD: Oh, we have no objection to any amendment of that kind.

THE COURT: Make the amendment setting out the years.

MR. ROBERTS: I think in the answer it sets out only the year 19—

MR. LORD: Counsel can amend at any time. It is an insignificant amendment. I do not care anything about it, just $25, or whatever it may be.

MR. ROBERTS: The year set out in the answer, if the court please, is only the year 1916 and it should be the year 1915 and the year 1917.

THE COURT: '15, '16 and '17?

MR. ROBERTS: Yes, '16 is already in and the amendment would be for the year, 1917, $14.38, and 1915, $16.80. It is not a very great amount.

RE-DIRECT EXAMINATION
BY MR. LORD:

Q. Mrs. Struett, I hand you here defendant's exhibit "A." How did you receive that?

A. Through the mails from Portland.

Q. Where were you residing then?

A. Salmon street, 472 Salmon street.

Q. What apartment house?

A. Well, I had a rooming house there.

Q. What time did it come through the mail; what date did you receive that?

A. Well, I do not know. You have the envelope there that was with it.

Q. You have testified that was before he went to California?

A. Yes.

Q. Well, when did he go to California?

A. In February, 1918.

Q. Did anything else come along with that?

A. Yes.

Q. Letter or writing?

A. Yes.

Q. What was the occasion of him sending that to you through the mail, had you had any disagreement?

A. In a way.

Q. What was the condition existing between you at the time you received that through the mail? What year was that in, Mrs. Struett?

A. 1918.

Q. 1918?

A. '17. Let's see, 1918, yes, sir.

Q. Did he know about Struett then?

A. Yes.

Q. What was his feelings toward you and yours toward him when he sent you that?

A. Well, he was the same he always was and wanted me to give Struett up.

Q. He saw the handwriting on the wall, did he?

A. Yes, sir.

Q. He knew it was all over between you two, didn't he?

A. Well, no, I do not think he did.

Q. He asked me if I intended to marry that man, and I said no, I never had any intentions, which I did not.

Q. Which man is that?

A. Mr. Struett, my husband now.

Q. You say that something else came in that lette with that?

A. Yes.

Q. I hand you this letter here, dated February 8, 1918, and ask you if that is it?

A. This is it.

Q. This is the writing?

A. Yes, sir.

Q. That is the writing that accompanied the exhibit?

A. Yes, sir, right here.

Q. Was that the envelope that accompanied it or not?

A. Yes.

Q. You testified you were living on Salmon street and you have a different address on there?

A. Well, that did not belong there, because I lived on Salmon street. That does not belong there at all.

Q. What is the reason that was put on there?

A. I do not know, you will have to ask him, but there is the Broadway where he was staying.

MR. LORD: I offer this in evidence.

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial. The only thing I think would be material about that is, if it shows it, would be the time.

THE COURT: The objection on that general ground is overruled.

MR. ROBERTS: I object to this letter as not having been proven. There has been no proof of the execution and it is not signed by anyone.

THE COURT: She says this exhibit which you have offered was enclosed in the same envelope with

that, the way I understand it.

MR. ROBERTS: But there is no mention whatever to the exhibit, no reference to the exhibit.

THE COURT: That may bear on the truth of her answer.

MR. ROBERTS: I think it is perfectly manifest there is a mistake about that.

THE COURT: That is something you will have to show in some other way besides objecting to the offer of it.

MR. ROBERTS: I do not think this letter has been identified.

THE COURT: The only identification is that she says that exhibit "A" was enclosed with it in the envelope in which it came to her.

EXAMINATION BY MR. ROBERTS

Q. Is this all that was in the envelope that you have produced here?

A. That is all that was in it.

Q. That does not end anywhere.

A. That is the ending.

Q. There is no ending there, it does not even say yours truly.

A. That was enough.

Q. It stops abruptly.

A. That was all there was to it.

Q. At a very interesting place. You say that there was absolutely nothing in that but this half sheet of paper which you have offered here?

A. They both came in the same envelope.

THE COURT: She has reference to exhibit "A?"

A. Yes, they were both together.

Q. How do you identify this envelope as being the one you saw It is not addressed to the place you lived at that time. Now, if you received other letters from Mr. Hill, how do you know that is the envelope. You admit you were not living there at that time?

A. Yes, that is all right if I was not.

Q. At the time you say that you got this, you say that you were not living at that place. You had lived at that place prior, hadn't you?

A. Here is February 8.

Q. I know, on this half sheet?

Q. Yes.

Q But I say that you had lived at the address on this envelope at a time prior, hadn't you?

A. Yes.

Q. And at the time you say that this letter was received, you did not live there at all, did you?

A. Not at that time, no sir.

Q. Mr. Hill knew where you were living, didn't he?

A. Well, he knew before, he knew Trinity Place.

Q. He knew at that time?

A. He did, yes, but I guess he did not want to address it.

Q. Did not want to address it right?

A. Evidently not.

MR. ROBERTS: If the court please I urge the objection to that being received in evidence.

THE COURT: Objection overruled.

The paper was received in evidence and marked as

Plaintiff's Exhibit "2."

RE-DIRECT EXAMINATION
(Continued)

By MR. LORD:

Q. That writing accompanied exhibit "A" of the defendant?

A. Yes.

Q. Had you had any discussion about the property?

A. No, sir.

Q. Or about the indebtedness at this time?

A. No, sir.

Q. What was the object? Was this sent at your request or any demand of any kind?

A. At my demand?

Q. Yes.

A. No.

Q. Where was this deed executed?

A. In Vancouver.

Q. Exhibit No. 1, plaintiff's exhibit No. 1. In Vancouver, you say?

A. Yes.

Q. I wish you would recite to the court the circumstances of the execution of that deed.

A. Well, he asked me—

MR. ROBERTS: We have been all over that.

THE COURT: Go right to it with a leading question.

A. He just wanted me to have a copy made of the deed.

Q. State briefly in relation to the execution of this deed, where it was done and how it was done.

A. It was done in the rooming house in Salmon street when I lived there.

Q. That is in Victoria?

A. No, in Portland, Salmon street, Portland.

Q. Who drew the deed, who wrote it?

A. Mr. Tempes.

Q. Where abouts?

A. In Vancouver. He told me to go over and have some Notary make it out, and so I did.

Q. Did he accompany you to Vancouver?

A. Not that time, no, not that day, but he was at the house at Salmon street that day until I started over.

Q. (By the court): I understand you simply took a blank deed and had your notary in Vancouver typewrite it and fill it out?

A. With the exception of the thousand dollars in there. I never saw it before, because I never knew anything about it at the time. I did not know anything at all.

Q. Did you read the deed before you signed it?

MR. ROBERTS: I object to that as immaterial.

A. It was the same as the original, only he said to H. B. Hill instead of my name, you see? You have here —the original deed.

Q. (By the court): You took the deed from your mother and copied the description?

A. Yes.

Q. I do not think that is what she meant. I have the

deed here. I think this deed discloses the situation. I hand you the deed. Is that the deed from your mother?

A. Yes, sir.

BY THE COURT: Did you take that to a notary in Vancouver when you had this deed made up, the one you were just looking at?

A. Yes.

Q. You took this deed here?

A. And had a copy made from this.

MR. LORD:

Q. Was this deed to be in every respect the same?

A. Certainly, yes, sir, yes, sir. Just exactly like it.

MR. LORD: I offer this deed in evidence.

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial.

THE COURT: The objection is overruled.

Thereupon said deed was received in evidence and marked as plaintiff's exhibit 3.

Q. Was the consideration in the deeds to be the same or not?

MR. ROBERTS: I object to that as calling for a conclusion.

THE COURT: The objection is sustained.

Q. What consideration was to be expressed, if any, in the deed from you to Mr. Hill conveying this property?

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial.

THE COURT: Objection sustained.

MR. LORD: I will take that subject to the objection if the court please.

THE COURT: The objection is sustained. The witness does not require to be led. If you want to ask her what, if any thing, the defendant said, about the consideration, you can ask her that question.

Q. What, if anything, did Mr. Hill say in reference to the consideration which should be expressed in this deed?

A. His name instead of mine in my deed, put "H. B. Hill" instead of "Katherine Anderson."

RE-CROSS EXAMINATION
BY MR. ROBERTS:

Q. I understood you to say that you went over to Clarke County, that is to Vancouver, with this deed, to the notary, Mr. Tempes, to have him make it out?

A. Yes.

Q. And Mr. Hill was not there?

A. He did not go to Vancouver with me. He stayed at the house.

Q. And you went over to the notary public, Mr. Tempes and told him you wanted him to make out this deed?

A. Yes.

Q. And after you told him that he made it out?

A. He asked me what I was doing with it, if I was giving it to somebody.

Q. He made it out?

A. Yes, he made it out.

Q. And no one present except you and Mr. Tempes?

A. That is all.

Q. That is all that was present, and then he made it out there in his office?

A. Yes.

Q. And you signed it and acknowledged it before him as Notary Public?

A. Yes.

Q. There in his office?

A. Yes.

Q. Such information as he had about the matter, so far as you know, he received from you?

A. Yes.

Q. He did not talk to Mr. Hill?

A. No.

Q. (By the court): Mr. Hill told you what Notary to go to?

A. No, no. He did not tell me that.

(Witness Excused)

PLAINTIFF RESTED

HARRY B. HILL, the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTS:

Q. You are the defendant in this action?

A. Yes.

Q. When did you first meet the plaintiff?

A. In September, 1912.

Q. Where?

A. Rainier, Oregon, at her sister's and brother-in-law's home.

Q. Her name then was what?

A. Mrs. Katherine Smith.

Q. How long had you known her sister and brother-in-law?

A. Since 1905, somewhere 1905.

Q. Were you ever a boarder in their home?

A. I boarded there at times when I was not working, stopped there and made it my home practically. They were friends of mine.

Q. You are a mechanical engineer?

A. Yes.

Q. And you always worked at that?

A. Yes.

Q. And you are working at that now?

A. Yes.

Q. Your home is now where?

A. Altoona, Washington.

Q. You are running an engine at Altoona?

A. Refrigerating plant, Columbia & Northern Fishing and Packing Co.

Q. When you first met her in 1912, where were you living then?

A. I was living in Portland.

Q. Then you saw her how often down there at Rainier?

A. 1912 you have reference to?

Q. Yes.

A. I saw her, the first time I met her, in September and then during the holidays of 1912 and '13, at Rainier.

Q. Then she went to Aberdeen and she said she was there a year and you saw her twice there?

A. Yes.

Q. Now, you later went to work at Cascade Locks?

A. I went to work at Cascade Locks in June, 1915.

Q. Then you were in Idaho?

A. From June 13 to December 17, 1917.

Q. Were you back during that period?

A. No, sir.

Q. "When you came back from there, where did you go to work next?

A. From Idaho I went to California. I was in California during the holidays and from California I came to Portland in January, January, 1918.

Q. Now, Mr. Hill, did you make any proposition of marriage in any form to this lady?

A. I did not.

Q. Did you ever talk about marriage to her?

A. I did not.

Q. Subject ever mentioned or discussed between you?

A. No.

Q. She stated that on each occasion when you visited her you paid her from $5.00 to $10.00 Is that correct?

A. That is correct.

Q. On every occasion?

A. On every occasion, maybe more, maybe $20.

Q. Now, are any of those items included in the claim which you bring here?

A. No.

Q. Now, Mr. Hill, will you explain to the court, or state to the court—it is conceded here you paid a mortgage on this property. State to the court how much you paid to satisfy that mortgage?

A. $801.00. That is including $83 interest previously paid; that is included in that $801.00, $83.20.

Q. Mrs. Struett said this morning you gave her that $83.20 when you were going east, through Aberdeen; is that correct?

A. I wrote a check out for that interest. I loaned it to her.

Q. That is what I meant.

A. Yes, I loaned her that money.

Q. And that was the first money you had loaned her?

A. That was the first money I ever gave her or loaned her.

Q. Now, the mortgage was in process of foreclosure, wasn't it?

A. It was.

Q. And you had to make settlement with the bank for the plaintiff?

A. I made settlement with the attorney.

Q. Now, what items were included in that payment?

A. Well, there was the principal, interest, taxes, and fees, that is court and attorney fees.

Q. Now, this loan that you made to her to buy the rooming house, how much money did you loan her at that time?

A. $200.

Q. Now, she said this morning she said it was $150.

Tell the court about that.

A. I can explain that very easily. She came to me, that is where I was working at Cascade Locks, and wanted money to buy a rooming house with, and I told her I thought she was sending good money after bad, I did not want to lend her the money because I was satisfied she could not make it go. She told me the size of the rooming house and so on, and she wanted some place to live, and she said that she could make a living out of it. I said that she could not make a livng out of it. She said that did not make any difference to me, she was willing to take the risk. Well, I told her, I says, before I can let you have any money, I will have to have some security for the money already loaned, and she said she would give me a deed for the amount, which she did later on. I loaned her the money. She said the rooming house would cost her $300 and she was to make a half payment, so I gave her $150 and then it seemed it was near the end of the month when the transaction was made and she discovered that she had to pay her month rent in advance and she asked for $50 more and I gave it to her.

Q. That is the way the $200 was loaned?

A. That is the way the $200 came in.

Q. Now, I have had a statement prepared here of certain items; just examine that statement and see if

that is a correct statement of the amounts paid, together with the dates.

Q. She admits you paid the taxes, that is correct, is it?

A. I did.

Q. And you have paid them every year since 1912?

A. With the exception of 1918. I have not paid 1918 taxes owing to the case being in litigation.

(The tax receipts were offered and received in evidence and marked as defendant's exhibits "E.")

Q. Now, I will ask you to answer that question, if that is a correct statement of your claim here as to the moneys paid with the dates.

MR. LORD: I am going to object to any such statement being offered in evidence. It is merely a self-serving declaration.

THE COURT: It is a tabulation, isn't it?

MR. ROBERTS: It is a tabulation to show the claim; he can prove it, of course.

THE COURT: Give it item by item before you offer it.

MR. ROBERTS: I have proven each item, if the court please.

THE COURT: If there is nothing there he has not already testified to, I would overrule the objection.

MR. ROBERTS: There is nothing here but what he has testified to. It is merely for the convenience of the court. That is all it is for.

Statement received in evidence and marked as defendant's exhibit "F."

Q. Now, Mr. Hill, you have stated here that you paid $801 on the 20th day of October, 1915?

MR. LORD: I object to counsel reading from the tabulated statement which is not admissible in evidence.

THE COURT: The objection is overruled. This is giving it in concise form so that I can get at the total.

A. I paid $801 minus $83.20 on that date.

Q. The $83 had been paid before?

A. Yes.

Q. Now, then, you have stated the date here on the 27th line as July 15, 1916?

A. Well, I could not exactly say the date, I am not

positive, but it was in July, 1916.

Q. Well, how near to the 15th?

A. 1916. It was just previous to this purchase on the boarding house. If they have any records of that, they would give the dates.

Q. These are the dates you paid the taxes?

A. Well, the tax receipts will show it.

MR. ROBERTS: I have had the interest computed, but, of course, the court can make its own computation.

Q. Now, Mr. Hill, you say that when it came up to your advancing additional money with which to buy the rooming house, this question of debt came up?

A. Yes, sir.

Q. Now, then, what was said. You have already stated you said you would have to have security and she told you she would give you a deed?

A. She told me she would give me a deed which she had.

Q. I will ask you whether or not that amount for which that deed was to be security, was agreed upon between you and her at that time.

A. She asked me when she was to have the deed made out, how much money she owed me together with the amount that she had borrowed for the rooming house and the amount paid upon the land, and I told her $1000.

Q. Now, who had the deed made?

A. Mrs. Smith, as far as I know.

Q. Were you present at all?

A. I was not.

Q. What, if anything, did you have to do with it?

A. I haven't anything to do with it.

Q. What, if any, suggestion did you make to her as to whom she should get to make it?

A. I did not make any.

Q. The deed is dated on the 10th day of August, 1916. Was it delivered to you at that time?

A. It was not.

Q. When was it delivered to you?

A. It was delivered to me on the 21st day—

Q. Of August?

A. No, of December, 1916.

Q. This agreement which she has introduced here, plaintiff's exhibit "1," bears date of December 22. I will ask you to state if that was the correct date of that instrument?

A. Yes, sir, that is correct.

Q.Now, you say that the deed was delivered to you on the 21st day of December?

A. Yes, I see it shows the 22nd here, but I may be wrong in a day. I was under the impression it was the 21st.

Q. State whether or not the deed was delivered to you on the same date that the instrument bears?

A. The 22nd; I received the deed on the 22nd.

Q. Did you receive it that day, or was it the day before?

A. No, I received it the day before. I recorded the deed after I received the deed.

Q. So that you received the deed December 21?

A. 21.

Q. And this is dated December 22?

A. That is dated December 22.

Q. Now, this instrument was in duplicate, the plaintiff had one and you had one?

A. Yes. In fact the plaintiff has had two.

Q. In fact the plaintiff has had two?

A. Yes.

Q. Explain that; what do you mean?

A. Well, when I received the deed, I mailed her this statement; later she claimed to not have possession of it; she had either lost it or something and could not find it.

Q. You mean that agreement?

A. That agreement. So I says I will give you another one so that you will have something to show, and I sent her another one, an exact copy of the first. Whether she received it or lost it, I have no knowledge, but that was her own statement. I wanted her to have the agreement she had agreed upon.

BY THE COURT:

Q. What did you say her statement was?

A. My statement I agreed to.

Q. Her statement was what?

A. She said she did not have it, she did not know whether she had lost it or not. She evidently misplaced it or lost it, something to that effect.

Q. After she got the second copy, did she ever see you or write to you anything correcting the statement of what is in there?

A. No.

BY MR. ROBERTS:

Q. Now, I hand you this letter marked exhibit "D," together with the envelope, and I will ask you whether you received that letter in the envelope attached through the United States mail?

A. Yes, sir, I did.

Q. Now, this purports to be a letter from Mr. William P. Lord, attorney.

MR. LORD: I object to that.

MR. ROBERTS: I offer this letter in evidence, if the court please.

MR. LORD: I object to offering it in evidence. It has not been properly proved.

MR. ROBERTS: Do you deny you wrote it?

MR. LORD: I am not on the witness stand.

MR. ROBERTS: Mr. Lord, will you kindly take the witness stand?

WILLIAM P. LORD, being duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. ROBERTS:

Q. I hand you exhibit "D" and ask you if that is your signature. Is that your signature?

A. That is my signature.

MR. ROBERTS: That is all.

MR. LORD: I want to make an explanation of that letter.

MR. ROBERTS: I do not think any explanation of that letter is necessary.

THE COURT: That would not be cross examination. In your rebuttal you can make any explanation.

MR. LORD: I am on the stand, called as a witness in this case.

THE COURT: You may consider it as rebuttal. You can make it now if you want to.

MR. ROBERTS: I object to that. I asked him if that was his signature and he says it is.

THE COURT: There is nothing to rebut unless the letter is offered.

MR. LORD: I admit this is my signature.

MR. ROBERTS: That is all.

MR. LORD: Are you going to offer it in evidence?

MR. ROBERTS: Yes, I expect to offer it before I am through with my case.

MR. LORD: Before I am off of the stand?

THE COURT: There will have to be a witness on the stand when an exhibit is offered, that is the general rule.

MR. ROBERTS: I will offer it now.

THE COURT: Admit it.

Said letter was received in evidence and marked as defendant's exhibit "D" and read to the court.

THE COURT: Now, you may make your explanation, but it will be considered as rebuttal and not cross examination.

MR. LORD: Now, your honor— —

MR. ROBERTS: I object to this as being improper in rebuttal and incompetent, irrelevant and immaterial.

THE COURT: I will hear you on the argument about what effect, if any, should be given to it, but I will overrule the objection at this time.

MR. LORD: In connection with that letter, at the time the matter was presented to me as attorney, it was not desired to go into the facts which have developed in this case; in fact, they were not submitted to me, I did not know anything about them. I took the original paper, which is defendant's exhibit "A," under date of December 22, 1916—that was handed to me with the other letter on blue paper here, and it was stated he refused to reconvey the property and what is said in that letter was only my conclusion from the very meager statement of the situation, and the party rather than to have any litigation was perfectly willing to pay what sum of money had been advanced on this mortgage, but it was never stated to me, as a matter of fact, that this money was a loan, that is the payment of this Kramer mortgage, or any money was a loan, and as far as any declarations are concerned in that letter, they were my own interpretation of the very meager facts that I had, that there were some six or seven hundred dollars due, as my letter shows there. I had not at that time seen

this deed which has been introduced in evidence which recites a consideration of $1000. I had not examined the records of Clarke county and this paper recited a consideration, promises and agrees to surrender and transfer said deed when Katherine Smith pays the full consideration in said deed, and I did not know what the consideration was except as they had told me; Mrs. Struett had told me that he had paid this obligation. I knew nothing about these previous relations which had existed or which would actuate him in making such a present, and it was only eventually that I secured the information which has been introduced in evidence, after writing that letter.

CROSS EXAMINATION
BY MR. ROBERTS:

Q. You say that you had before you, when you wrote this letter which has been introduced in evidence, and which is marked as defendant's exhibit "D," the agreement which is defendant's exhibit "A," and the blue paper which is exhibit "C"?

A. Yes, sir.

Q. That is correct?

A. Yes. I do not remember that maudlin poetry which the respondent has written.

Q. That is immaterial, you had this (indicating).

Now, then, you say that you wrote that letter under the impression and because he had refused to convey the property, whereas the letter which you admit you had before you, states exactly the contrary, doesn't it?

A. Oh, I do not know what the letter states.

Q. No, I do not think you do. That is all.

A. I dictated the letter.

Q. Wait a minute. She had been in consultation with you at that time since the 28th day of July previous. She first saw you in connection with this matter in July prior to the January when you wrote that letter?

A. I do not believe I ever saw Mrs. Struett until a day or so before I wrote that letter.

Q. She is mistaken about that, isn't she?

A. I think that she must be, because I am satisfied that she did not see me until that time that letter was written.

(Witnesse Excused)

HARRY B. HILL, being recalled, continued his testimony as follows:

DIRECT EXAMINATION (Continued)
BY MR. ROBERTS:

Q. Now, did you ever at any time refuse or object to the re-conveyance of this property?

A. No, sir.

Q. Now, after you received this letter from Mr. Lord, Mrs. Struett came over to Altoona, to see you about this matter, did she not?

A. She did.

Q. And what did she say she came over for?

A. She came over to see if she could not settle the matter.

Q. Did she say anything at that time about not owing you money?

A. No.

Q. She says she offered to pay you at that time. State the fact about that?

A. She told me—she asked me first, how I would want to settle. Well, I says, just as I wrote you. Well, she says, I have not the thousand dollars, but she says, I have five hundred dollars I could give you tomorrow. I says, very well. She says I will have the balance in a short time, possibly a couple of weeks or such a matter. Well, I told her, I says, that is satisfactory as far as I

am concerned. I says, the matter is now in the hands of my attorney, Mr. Harrison Allen, in Portland, and I says you can either pay the money to Mr. Harrison Allen, or you can deposit it in the bank, and when you have the full amount, the deed will be turned over to you.

Q. After you received this letter from Mr. Lord, did you consult an attorney?

A. I went immediately; that is, I received that letter on Friday and I went to Portland on Sunday and saw Mr. Harrison Allen and I left the paper and everything in his care, and he has had them ever since until I delivered them to you two or three days ago, Monday morning.

Q. You say that you told her at that time that any settlement she made with Mr. Allen would be all right?

A. I did.

Q. Now, you have been ready at all times on receipt of the money to re-convey this property?

A. How is that?

Q. State whether or not you have been ready at all times to comply strictly with your agreement to reconvey this property?

A. Any time.

A. Any time.

Q. On receipt of the money?

A. Any time, any time.

CROSS EXAMINATION
BY MR. LORD:

Q. How much money do you claim is due from Mrs. Struett?

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial, and not proper cross-examination.

THE COURT: Objection overruled.

A. Well, the amount set forth in the answer.

MR. ROBERTS: We amended that this morning and added a couple of tax payments.

WITNESS: We have added, of course, that to the answer.

Q. You are asking her to pay you back, 1,288.49?

A. I cannot swear that computation is correct, but the amount of the principal is correct there, that was computed in Mr. Robert's office. Now, as to the correctness of that I can not swear. That would be left to

the court, I should judge.

Q. (By the court): You mean the principal of the items you swear to?

A. I swear to. The computation I won't because I did not go over that.

Q. You did not charge anything for any other moneys which you may have given her?

A. I have no charge whatever for any other moneys that I may have given her, none whatever.

Q. How much did you give her?

MR. ROBERTS: I object to that as immaterial if he means outside of these items.

Q. Yes, I mean outside of these items.

THE COURT: Well, he did speak about items of five and ten and perhaps twenty dollars. it is cross examination. Objection overruled.

A. Well, I could not state exactly how much money, but I have an idea it would be more than double that amount.

Q. An idea it would be more than double $1288. In other words, probably $2500, in four years' time?

A. Well, no, hardly that. No, that would not be

right. Of course, I would not make an accurate statement. As I told you any time I met her, that is, saw her, of course, I gave her anywheres, five, ten or twenty dollars, nothing less than five at any time.

Q. What purpose was that given for?

MR. ROBERTS: I object. I do not believe that is going to help the court and there could not be anything gained by it.

THE COURT: The objection is sustained. The defendant has not undertaken to contradict the plaintiff at all regarding this relationship. There has not been any testimony in any way contradicting that so there is nothing to cross examine him about on that.

MR. ROBERTS: That is my idea.

THE COURT: It stands unless there is some other evidence beyond her statement that is in contradiction to it, and the court will take it.

Q. Well, Mr. Hill, you stated you never talked marriage with this plaintiff?

A. I did state that.

Q. You never intended to marry her at any time during your relations with her?

A. I did not

Q. Were you a single man or a divorced man at that time?

MR. ROBERTS: I do not believe there is anything to cross examine about on that.

THE COURT: In this character of cases, the bars are thrown down on cross examination. There really are no barriers and this witness having stated he never talked marriage to her, it has opened up a wide field, so that I will overrule the objection.

(Question read).

A. What time?

Q. During the years 1912 to '18?

A. 1912.

Q. To '18?

A. From 1913 to 1918 I was single.

Q. You were in a position then that you could have married the plaintiff if you saw fit to do so?

A. I could do so, nothing to hinder me from it.

Q. And you want the court to understand that you never intended to marry her?

A. I never intended to marry her; that was never thought of; there was no occasion for anything of the kind.

Q. Your relations with her were perfectly satisfactory?

MR. ROBERTS: I object to that.

THE COURT: Objection sustained.

Q. The first money that is of any considerable sum, you gave her was the $200 for the rooming house?

A. No.

THE COURT: There may be a misunderstanding there. You mean gave into her hands when you said gave her?

Q. Well, how much money did you say was put into this rooming house?

A. In the rooming house?

Q. Yes.

A. $200.

Q. Did you write a check for that sum of money?

A. I did not. I wrote a check for $150, and gave her $50 in cash.

Q. You want the court to understand that she agreed to repay that money to you?

A. She did.

Q. And it was a loan?

A. It was a loan.

Q. You wrote her a good many letters, did you not?

MR. ROBERTS: I object to that as not proper cross examination and as incompetent, irrelevant and immaterial.

THE COURT: Objection overruled.

Q. You wrote her letters?

A. Yes, I wrote her letters as well as she wrote me.

Q. In those letters you made a great many statements of your affection for her.

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial.

THE COURT: The objection is overruled.

MR. ROBERTS: Not the best evidence.

THE COURT: Objection sustained.

Q. The only charges you made, you say, are the charges for the rooming house, that is $200, and the money paid on the Kramer mortgage and attorney's fees and so forth?

A. And the interest. That was loaned her in 1914.

Q. How about the trip to California; did you charge her in that rooming house deal, with any of that money?

MR. ROBERTS: I object to that as not cross examination and as incompetent, irrelevant and immaterial, he has stated over and over here he charged her with absolutely nothing except these two items, I might say three, mortgage, taxes and interest.

THE COURT: This is about the rooming house.

MR. LORD: I asked him, did he charge any of that money of his trip to California into the rooming house obligation. I want to see what moneys he has tried to get back.

THE COURT: That is what I understood you, whether part of the expense to California was charged against the rooming house, objection overruled.

MR. ROBERTS: That is assuming he made a trip to California.

Q. You made a trip to California, did you not?

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial, not proper cross examination.

THE COURT: Objection overruled.

A. Yes, sir.

Q. When you went to California, what year was it in?

A. I have been to California a number of different times.

Q. What year, did you go in 1916?

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial.

THE COURT: Sustained.

Q. I will ask you, did you pay Mrs. Struett's railroad fare to the State of California?

A. I never did.

Q. You never did?

A. I never did.

MR. ROBERTS: I object to that. It was answered before I had a chance to object to it. I want to object to it.

THE COURT: There is nothing for the court to rule on.

MR. ROBERTS: I move to strike it out. (Discussion).

THE COURT: In view of what the court knows

about criminal law and counsel for the plaintiff having said that the witness might have a chance to answer it somewhere else, I will sustain the objection.

MR. LORD: Exception.

MR. ROBERTS: I ask that it be stricken out?

A. It will be stricken out.

MR. LORD: Exception.

Q. You say that this money for the rooming house was loaned about July, 1916?

A. About that time, yes.

MR. LORD: I want to offer this letter in evidence.

MR. ROBERTS: What is the purpose of offering this?

MR. LORD: The purpose is to show and to impeach his statement about the marriage.

MR. ROBERTS: There is not a word in it about the marriage. I have read it all.

MR. LORD: The relationship, for one thing, and another thing is, this is not a gift, according to their contention. It shows the relationship between the parties. The statement I particularly desire to call the

court's attention to is the one that she need not want or freeze this winter, tending to disclose whether any moneys that had been advanced were a loan or a gift.

THE COURT: Objection sustained.

Q. I hand you this letter; is that your handwriting?

A. Yes, that is my handwriting.

Q. You wrote that to Mrs. Katherine Smith, who is the complainant in the case?

A. Undoubtedly did from the address on the envelope.

MR. LORD: I will offer that letter in evidence.

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial; not cross examination.

THE COURT: Objection sustained.

MR. LORD: Exception. I will offer it subject to the objection. Being an equity suit, I want to complete the record.

Thereupon the letter referred to was marked as plaintiff's exhibit No. 4.

Q. I will hand you a letter dated June 12, 1916.

MR. ROBERTS: To save time, I will admit he wrote it.

Q. Signed Harry?

MR. ROBERTS: I admit he wrote it.

MR. LORD: I will offer it in evidence.

MR. ROBERTS: Objected to as incompetent, irrelevant and immaterial, not proper cross-examination. This is along the same lines.

THE COURT: Objection overruled, the letter will be admitted.

The letter was received in evidence and marked as plaintiff's exhibit "5."

MR. ROBERTS: (After examining another letter). This letter is dated September 2, 1916. I admit he wrote it.

MR. LORD: I offer this in evidence.

MR. ROBERTS: I object to that as not cross examination, incompetent, irrelevant and immaterial. Not a word in it about marriage. Not a word in it about this money. Not a word in it about the subject matter of this controversy.

THE COURT: Objection overruled. It will be admitted.

MR. ROBERTS: I want to say here if these are being admitted on the ground of any bearing they may have upon the marriage promises, the marriage is not an issue in the case. There is no charge here about that. That is why I have objected all the time on the ground that it is incompetent and immaterial. It is not an issue in the case.

Thereupon said letter was received in evidence and marked as plaintiff's exhibit No. "6."

Q. You made out a writing which you delivered to Mrs. Smith, who is now Mrs. Struett, purporting to bequeath to her all of your property, did you not?

MR. ROBERTS: I object to that as not an issue in this case.

Q. Along about the time that this property was conveyed to you?

MR. ROBERTS: I object to that as not proper cross examination.

THE COURT: Objection is sustained.

MR. LORD: Exception.

Q. Did you take out a life insurance policy in her favor?

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial.

THE COURT: In whose favor?

MR. LORD: Mrs. Struett's favor.

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial.

THE COURT: The objection will be overruled.

A. I did not.

Q. That Mrs. Struett is beneficiary?

A. I did not. I never took out any insurance policy.

Q. Did you write her in August, 1912, to the effect that you had taken out the insurance policy?

A. I do not think I did. If I did it was a mis-statement. Nothing in the record that will show that I took out an insurance policy.

Q. Is that your handwriting (handing witness a paper)?

A. That is my handwriting, yes.

MR. ROBERTS: This is dated August 12th. You asked him if he wrote her a letter in 1912.

MR. LORD: I asked him if he wrote her that particular letter I am offering in evidence.

MR. ROBERTS: What is the date?

MR. LORD: That is August 12, 1916.

MR. ROBERTS: I object to that letter on the ground it is incompetent, irrelevant and immaterial.

THE COURT: It will be admitted.

Thereupon said letter was received in evidence and marked plaintiff's exhibit 7.

Q. In July 26, 1916, you were purchasing some sort of patent, weren't you?

A. I haven't purchased any patent.

MR. ROBERTS: I cannot think that is material.

THE COURT: I will sustain the objection.

MR. LORD: Of course, the materiality cannot be shown in one question exactly.

THE COURT: Put it all in one question.

Q. Well, in July, 1916, you were buying a patent, which you gave Mrs. Struett one-half interest in; is that not a fact?

MR. ROBERTS: Objected to, as incompetent, irrelevant and immaterial.

THE COURT: Objection overruled.

MR. ROBERTS: Not cross examination, if the court please.

A. I have never bought any patent.

Q. Did you ever send her $150 to pay for a patent?

A. Yes. I have the returned check in my pocket.

Q. And was that a gift to her?

A. Gift to her?

Q. Yes.

A. It was not. I can explain that.

Q. There is no part of that that was a gift to her?

A. No part of that. The transaction was with another party and the party was to call there for the money and I forwarded the check to her to deliver to him.

Q. But you did not give her any interest in it?

A. I did not give her any interest in it.

Q. I hand you a letter dated July 26, 1916, and ask you to identify that letter, whether or not it is your signature?

A. This letter states that I promised to give her one-half of anything I should derive from this. That is very true. I will admit that.

Q. It is a fact, then, that you did agree to give her one-half of the profits out of that adventure?

A. Should I secure it.

Q. That was along about the time this rooming house was purchased, too, wasn't it?

A. In fact the party concerned, he and his friend—well I don't know whether he was or not, but a friend of his was rooming with Mrs. Smith at the time and Mrs. Smith introduced them to me. She said that he had something there which they thought was very good and she would like me to look at it. I says all right, I will look at the device, and agreed to, but in the meantime Mr. Jones had sold this to another party.

Q. What do you mean by that, didn't have anything to sell you at all?

A. I bargained with him for a half interest in a devise, not a patent. He has not got a patent.

Q. What?

A. He hadn't any patent. He had a device and I agreed to take a half interest with him and he was to pay back the amount paid as soon as they got on the

market. He wanted something to help start this matter along, but the check did not reach him in time and he sold a half interest in it to another party that took up the matter and manufactured the article.

MR. ROBERTS:

Q. You never got anything I understand; I understand you never got anything out of it?

A. Not according to that, not from that deal.

Q. That is what I mean.

A. Not from that deal, I never received anything from that deal.

MR. LORD:

Q. Is it a fact you never demanded back from Mrs. Struett any sum of money whatever that you had given her?

A. That is not a fact.

Q. When did you make a request then?

A. When did I make a request for it?

Q. Yes.

A. I loaned her this money, owing to the fact I was a friend of the family and had been for a number of

years. She was stopping there; hadn't any money to pay this off—understand? And she agreed to pay it back as soon as she possibly could. She represented to me and always had represented—

THE COURT: The question was, when you made demand—when did you ask her for the money back?

A. Oh, I have never asked her for money back. I just simply gave her a little note there stating that I would deliver the deed upon the payment of $1000 whenever she asked me or whenever she gave me the money.

Q. But that was delivered long after the rooming house was purchased and long after it had been abandoned, isn't that right?

A. No, not after it had been abandoned.

Q. How long was it in fact? That writing was not in fact sent to Mrs. Struett until after 1918?

A. Oh, yes, it was. I answered that question once before. I gave her that when she presented me with the deed, and she claimed to have lost it, misplaced it or something of the kind, she didn't have it in her possession, and I gave her another one.

Q. Gave her two, then?

A. I did; I gave her two.

Q. You never took any promissory note from Mrs. Struett?

A. Never took any promissory note from Mrs. Struett.

Q. And didn't you expect that woman whom you did not intend to marry would have trouble about this transaction?

A. I did not. I had loaned her brother-in-law and sister some money; that is possibly twice that much without any security. I supposed she was just as honest as they were. They paid it back without anything.

MR. LORD: I want to offer this letter in evidence. I will offer only this part of this letter.

MR. ROBERTS: I object to that. (Discussion).

MR. LORD: I will offer the entire letter in evidence.

MR. ROBERTS: I object to that letter as incompetent, irrelevant and immaterial, and not cross examination.

THE COURT: I will sustain the objection.

MR. LORD: Exception. I will offer it subject to the objection.

THE COURT: Make your record on it, show it was offered and the objection was sustained, and it was identified.

Letter dated July 26, 1916, was marked for identification as Plaintiff's Exhibit 8.

Q. As I understand, you registered Mrs. Struett as your wife in a hotel in 1916?

MR. ROBERTS: I object to that as incompetent, irrelevant and immaterial.

THE COURT: She said he did and he has not denied it. So that I sustain the objection.

Q. What do you intend to become of this woman after all of these years of your relationship with her?

MR. ROBERTS: Objected to.

THE COURT: Sustained. This is not a damage suit.

RE-DIRECT EXAMINATION

BY MR. ROBERTS:

Q. Just a matter I overlooked. Mrs. Struett stated after she sold the rooming house she offered to repay you that $200 and you would not take it. Is that true?

A. I never heard anything of it.

Q. Now, then, in July apparently she wrote you a letter asking how much she owed you and you wrote back and told her, didn't you?

A. I did.

Q. And then after January, after you got the letter from Mr. Lord, she came over to see you again and tried to settle with you?

A. She did.

THE COURT:

Q. You said you let her have $83?

A. The $83, your honor, was loaned to her to pay taxes on the mortgage from 1912 to 1914, the interest on the mortgage.

Q. That is something you gave her before you finally took up the mortgage?

A. Yes, that was the first payment.

Q. And that $83 is in the $800?

A. $801, yes, sir.

Q. That is correct?

A. Yes, sir.

MR. ROBERTS: You remember Mrs. Struett testified about that, there is no dispute between them and he states he gave her that to pay the interest?

WITNESS: $83.20.

(Witness Excused)

DEFENDANT RESTED
REBUTTAL

MRS. STRUETT, the plaintiff, being recalled, testified as follows:

DIRECT EXAMINATION

BY MR. LORD:

Q. Did you ever borrow $83 from Mr. Hill?

MR. ROBERTS: I object to that as not rebuttal; she said she got the $83 from him at Aberdeen and got it to pay interest on the mortgage.

THE COURT: Don't open this all up again. I will overrule the objection to this.

MR. LORD: That is the only question I want to ask her.

WITNESS: No, sir, I never asked him for a nickle. He gave it to me, told me not to worry. I was a widow at that time and I didn't have any money or anything else. That was on his trip East; and he wrote me a check.

MR. ROBERTS: You used that $83 to pay interest on this Kramer mortgage, did you not?

A. Yes, sir.

(Witness Excused)

PLAINTIFF RESTED
CASE CLOSED

MR. ROBERTS: (During argument): I would like to ask one question; I don't know whether it is material or not. Mrs. Struett, what is the value of that land?

MR. LORD: I object. Its value is admitted in the pleadings.

THE COURT: It is admitted to be in excess of the jurisdictional amount, the value set out.

MR. LORD: I will admit that the respondent has made himself safe.

MR. ROBERTS: At the same time it is very questionable whether this court has any jurisdiction in this matter.

THE COURT: If that is your purpose, to attack the jurisdiction of the court on the value of this land at this time, I will sustain the objection.

MR. ROBERTS: Of course, as I stated to your honor, I did not have anything to do with making up the issues in the case.

THE COURT: If you want to show, without attacking the jurisdiction, that there is nothing unconscionable about the transaction—

MR. ROBERTS: There could not be that, because we are offering to convey.

THE COURT: Then I sustain the objection.

MR. ROBERTS: We offered all the time to convey and offer in court to convey. That is all.

THE COURT (after argument): It is not the provine of the court to determine in this case whether or not the defendant's conduct was sportsmanlike or not. This is a court of equity and if the transaction is tainted with immorality, why both parties would have to go out of court without any affirmative relief, that is the defendant would not be allowed to foreclose and the plaintiff would not be allowed to secure a decree commanding the defendant to transfer, or a commission if he refused to transfer, the property. The trouble about untangling the part of these transactions which were legal

and the part which may have been tainted with immorality and illicit relations between the parties, presents the difficulty in this case, and where there is a dispute between two individuals, the court's safest guide is the writings passed between the parties, viewed in the light of the circumstances and conduct of the parties.

This man it seems had enjoyed the most intimate relations with the plaintiff for a year or two before he took up this mortgage, and all it was costing him so far as the evidence disclosed was certain amounts of money that he paid on his visits to her. Therefore, I conclude that when he advanced this amount of $801, there was not any necessity staring him in the face so that it would be necessary to part with any such large amount of money in order to continue to enjoy all these illicit relations, and there was not any threatened separation, or he was not threatened with a loss of her if he did not do this. Therefore, I conclude that his putting up this money to take care of that mortgage was not tainted with anything illicit. It may have been that if the illicit relations had not existed between them and she had been a stranger to him, he would not have done it, but what a man's motives may be is not necessarily a part of the consideration of a contract. He may help a friend where he would not help a stranger. He may help a mistress where he would not help his mother-in-law, but that does not taint the transaction necessarily. A man may have a lawful transaction with a person with whom he is having unlawful transactions, but I think that these writ-

ings will have to be construed, where uncertain, against the defendant, and that anything he did not include in the writing will be looked upon as a gift. He promises to turn over this property on the payment of the amount of money, a thousand dollars, but he does not say anything about interest. It may be in ordinary writing between parties we would not construe it as close as this, and the court could conclude that interest was recoverable at the legal rate, but he was making gifts to this woman and right in the face of it he had advanced more than a thousand dollars on this property when he wrote her that he would surrender it to her on the payment of a thousand dollars. So there was a gift of all over and above the thousand, and the court concludes that he intended to give her anything that he may have advanced over a thousand dollars and any interest within a reasonable time, and I hold that the time is not unreasonable. I will also take the plaintiff's version of the rooming house transaction and hold him down to $150 on that. He says he gave her a check for $150 and cash for $50. Being a disputed point, there is nothing brought to corroborate either of them, the burden is on the defendant to show the fifty. I see it would amount to a thousand dollars on that debt without that wouldn't it?

MR. ROBERTS: It would amount to more than a thousand, yes, without that extra $50. May I suggest I think we would be entitled to the subsequent tax payments?

THE COURT: That is $14 in 1918. He is entitled to the payment of this and the subsequent one in 1917.

I find that there was no misunderstanding of marriage. These relations were entered into when neither party could marry the other or anybody else, and the court's observation is that having obtained their ends and a substantial part of the advantages of the married relation without any of the responsibilities, human experience teaches that people who have arrived at mature years as both these parties had do not rush off and get married just as soon as the bars are removed, as long as they can get along and enjoy a large part of their liberty and sustain their intimate relations at intervals sufficiently frequent to gratify those who have arrived at that time of life.

Also this case might present a different aspect if the plaintiff was young and inexperienced at the time this arose, and if this man had exercised some commanding influence over her, but there is nothing to show he did. The fact that he did not make this demand on her until he did, is also a circumstance. Experience also teaches there is a time that comes when under different circumstances or from interest in somebody else, the hot friend cools. That time may have arrived. That is one of the disadvantages of such illicit relations—nothing to be surprised at. You both understand what I hold?

MR. ROBERTS: As I understand, you find the defendant is entitled to $1000, without interest on the $1000 except from this date, and that you allow us in

addition to that two years' taxes, 1917 and 1918, the last two items of taxes, one for $14.82 and one for $14.38, making $29.90, with interest from now. Then the finding is $1029.20. Of course, it follows as a matter of course we are entitled to the foreclosure.

THE COURT: It is found to be a mortgage, and you are entitled to foreclose.

PLAINTIFF'S EXHIBIT 1
(Copy)

Warranty Deed

The Grantor Katherine Smith, a widow, formerly Katherine Anderson, for and in consideration of one thousand and no/100 dollars in hand paid, conveys and warrants to H. B. Hill, of Cascade Locks, Oregon, the following described real estate situate in the County of Clarke, State of Washington, to-wit: Beginning 37.42 chains East and 15.68 chains South of the Northwest corner of Section 10, Township 2 North Range 1, East W. M., running thence South 4.32 chains to Southeast corner of the Hannah Tyszkiewicz tract, thence East 17.81 chains more or less to the center of the county road; thence North 7 degrees 45 minutes West along said road 4.36 chains, thence West 17.28 chains more or less to the place of beginning, containing 7.58 acres more or less.

Dated this 10th day of August, A. D., 1916.

KATHERINE SMITH (Seal)

Executed in presence of:
F. W. TEMPES

State of Washington }
County of Clarke } ss.

I, F. W. Tempes, do hereby certify that on this 10th day of August, A. D., 1916, before me personally appeared Katherine Smith, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that she signed and sealed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and Official Seal, this 10th day of August, A. D. 1916.

(Notarial Seal) F. W. TEMPES,

Notary Public in and for the State of Washington, residing at Vancouver in said County.

(Endorsement) No. A12482 Warranty Deed from Kathrine Smith to H. B. Hill. Dated ....., 191..... The within instrument was filed for record on the sixth day of June, 1917, at 11:15 o'clock A. M., and recorded in Book 120 of Deeds on page 587 Records of Clarke County, State of Washington at request of H. B. Hill.

.....
Auditor and Recorder.

By.....
Recorder's Fees, $ .75 Deputy.

Mailed to.....

PLAINTIFF'S EXHIBIT 2

(Copy of Letter)

Broadway Hotel, Portland, Ore., Feb. 8, 1918.
Dear Sweetheart:

With my eyes filled with tears, and the thoughts of past years that I have happily spent with you, I'm so lonely and sad that I'm near driven mad, and know not what to do.

So goodbye, good luck, and may your future life be filled to overflowing with joy and happiness, is the earnest wish of one who has loved you dearly for yourself alone.

(Copy of Envelope)

BROADWAY HOT EL (Post Mark)
Broadway and Burnside Street Portland, Oregon
Portland, Oregon Feb. 8 7-PM 1918

Mrs. Kathryn Smith,
39 Trinity Place,
Care Berkley Apts. City.

PLAINTIFF'S EXHIBIT NO. 3

(Copy)

Warranty Deed

The Grantor, Sarah J. Anderson, widow of Clarke County, Washington, for and in consideration of love and affection in hand paid, convey and warrant to Katherine Anderson, a single woman of same County and

State, the following described real estate situated in the County of Clarke, State of Washington, to-wit:

Beginning 37.42 chains East and 15.68 chains South of the Northwest corner of Section 10, Tp. 2 North Range 1 East W. M., running thence South 4.32 chains to the Southeast corner of the Hannah J. Tyszkiawicz tract, thence East 17.81 chains more or less to the center of the County road; thence North 7 degrees 45 minutes West along said road 4.38 chains, thence West 17.28 chains more or less to the place of beginning, containing 7.58 acres more or less.

Reserving, however, unto the said Sarah J. Anderson and her assigns the free and unobstructed use during the period of her natural life, of all improved land on said described tract and of all improvements thereon.

Dated this 13th day of October, A. D. 1906.

MRS. SARAH J. ANDERSON (Seal)

Executed in Presence of
J. H. ELWELL,
T. H. ADAMS

State of Washington }
County of Clarke } ss.

I, J. H. Elwell, the undersigned, authority, do hereby certify that on this 13th day of October, A. D. 1906, before me personally appeared Sarah J. Anderson, a widow, to me known to be the individual described in,

and who executed the within instrument, and acknowledged that she signed and sealed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 13th day of October, A. D. 1906.

J. H. ELWELL,

Notary Public for Washington, residing at Vancouver, Wash.

38935 Warranty Deed from Sarah J. Anderson to Katherine Anderson. Dated Oct. 13, 1906. I hereby certify that the within Warranty Deed was filed for record in the Auditor's Office of Clarke County, Wn., by Sarah J. Anderson on the 23rd day of March, 1910, at 11:20 o'clock A. M., and that it is recorded in Deed Records of said County, on Page 374 of Book 81. M. B. Kies, County Auditor of Clarke County, Wash. By.....Deputy. Recorder's Fees 60c.

PLAINTIFF'S EXHIBIT 4

(Copy of Letter)

Monday Morning's Mail

Sat. 8:15 P. M., Sept. 30/16.

Dear Little Sweetheart:

Your ever welcome received last P. M., so sorry you feel so miserably; you say sick at your stomach; could

there possibly be anything wrong you know what I mean I should hope not. just see what you missed sweetheart by me being there last Sunday. just think what a fine time you would had joy riding on the Highway with the bunch and little Simon. Yes Sweetheart I expect you would like to see all the Folks I know you feel lonesome, but try and make the best of it Yes, I wish I could be there to have supper with you. don't worry about where you will be this winter. I will see that you don't freeze. this time last Sat night I was buying some Clam Wet. you bet I wish I was there tonight with you instead of up here all alone. Some Clam Wet would sure be fine now, and I could love you a whole lot too. Sweetheart I know how you feel about giving up your kitchen it is nice and handy and a good living room too. Now Dearie don't sell the house if you don't want to. the only reason I suggested you sell was because you were not getting anything for what you were doing. I am willing to help you along with it if you just want to keep it for a Home. Well Sweetheart I have lots of work for tomorrow as they expect to start the mill going Monday. I don't think it will run more than a month or so this time. Yes Dear winter will soon be here. I hope it won't be so cold and snowy as last winter. It looks tonight as if it might rain the weather has been fine most all week. Sweetheart I am getting seepy and I wish I was going to bed where I did last Sat night. do you wish so too? or would you rather seepy by your lonie. I try to be as careful as I possibly can sweetheart. Well good night with all my Love and a bushel of Kisses and every other little sing. Lovingly yours,

HARRY.

(Envelope) (Postmark)

Cascade Locks 2.....Oregon
Mrs. Kathryn Smith,
408 Main Street,
Portland, Oregon.

PLAINTIFF'S EXHIBIT NO. 5
(Copy of Letter)

Monday, 7 P. M., June 12/16.

Dear Sweetheart:

Your very dear letter of the 11th rec'd this P. M. very glad as usual to hear from you, but so sorry you are so lonesome and blue, cheer up you are not left alone, nor will you want for the necessities of life as long as I am able to secure them for you. I am glad you do love Aubrey and Bob. I think they appreciate and love you in return. Sweetheart you ought to go to bed earlier than you do every night. You may not feel the effects now but will in the years to come. I am sorry your cold isn't any better, you must take better care of yourself. Sweetheart you don't have to be dependent on your relatives in fact you are not for you always do more than enough to pay your way. I think sweetheart I fully understand the assertion you made in your letter and I surely appreciate your feeling toward me, and hope you will never have any reason to regret that ever felt toward me as you say you do. You have the right idea when you say I want a good pal, and I fully believe I have found one in you, and have absolute confidence in

your doing just what you say you will. I have no desires to find some one I could care more for. I only wish I was situated so we could be together, hope to be some of these days. I want to get a little money ahead so that we can go to some other part of the country. I suppose Aubrey is in Crockett by this time. I hope she will like her new home. You write to Bob he was looking for a letter today, said to me he didn't get any letter. I asked him who from and he said from Kate. Yes, you meet the train, I will be there if nothing happens to prevent my coming. With best wishes, Love and Kises, Good night pleasant dreams,

Lovingly yours,

HARRY.

PLAINTIFF'S EXHIBIT NO. 6

(Copy of Letter)

Saturday, 7:15 P. M., Sept. 2/16.

Dear Sweetheart:

Your ever welcome rec'd last P. M., glad as usual to hear from you. No we don't have much time together there is always some one around. Yes we have been fortunate as far as the night time is concerned. I am not much good at night. I am always to sleepy or asleep, a large pink rose just fell all over this just completely covered it up. My nice boquet is beginning to go to pieces. Sweetheart I would like to go down tonight but I have to much work to do tomorrow. I have been away more this summer than I ever have anywhere I worked.

As a rule I don't neglect anything, but I have been in Portland when I really ought to have been here. Whoever this man is that told you that the Lady would trade even her 30 apartments for your 13 rooms, must need fixing or else she is out of her head. You know, Sweetheart that could hardly be possible. Now as I can't come my advice to you is sell the house you now have if you possibly can, and forget about rooming houses just get you a couple of furnished rooms. There you won't have to be bothered with a mob around you all the time. I realize your ambition but Sweetheart there isn't anything to be made in that line especially where you have to be alone. There is nothing but plenty of hard work and no pay, but do as you like for I can't be there and here too. Well sweetheart it is raining here tonight and I got wet coming home from the mill, but I will soon be in bed and forget about it. There is some show people stopping here, two couple and a little fellow. They expect to be here until the middle of next week. I think I will shave now while there is hot water. Then I can take a bath tomorrow if I get time after I am through with my work. Wishing you success sweetheart will bid you a fond and loving goodnight, pleasant dreams. With best wishes, love and kisses and every little thing.

Lovingly yours,

HARRY.

PLAINTIFF'S EXHIBIT 7

(Copy of Letter)

Tues. 9:30 P. M., Aug. 12/16.

Dear Sweetheart:

It is rather late but will write you a few lines before

I go to bed. I just came back from the Doctor's where I have been for most two hours, not sick or hurt only being examined for life insurance. I made application for $5000 policy which may be of some benefit to both of us some day. I went to bed last night before 7:30. You bet I was some sleepy fellow. I just got on the train and sat down when it pulled out. I didn't have half a minute to spare. I had to wait at 5th street so long for a depot car. I wish I could stayed longer. I didn't want to leave at all. But it is a case of keep going or else go hungry. I was dreaming of you most all night why I don't know, for I seldom dream of any one. I hope you are well. I am some sleepy so good night Sweetheart with Love, Kisses and all the rest.

Lovingly yours,

HARRY.

(Envelope)

Cascade Locks, Oregon Sep. 13.
Mrs. Kaythryn Smith,
408 Main Street,
Portland, Oregon.

PLAINTIFF'S EXHIBIT 8
(Copy of Letter)

Wed's. 7 P. M., July 26/16.

Dear Sweetheart:

Just a few lines before bed time. I rec'd the papers from Mr. Jones last P. M. I will sign them and send

them back tomorrow. I am sending you the check for $150 which you will hand him when he delivers the papers to you properly signed. I have to sign before two witnesses and so does Mr. Jones. I agreed to pay him $100 for a half interest in the Canadian patent when it was granted, but in the papers he sent me it stated when the application and assignments are executed by Mr. Jones. He wants to change that part and have it read when the patent is allowed or granted. He wrote me a letter stating he would make such changes as I might suggest so before you hand him the check read the agreement and see whether he has changed that part of it the rest seems to be all right as far as I can see and understand. If you don't understand have Mr. Jones explain to you and see that he fully understands that he is to receive the $100 when the patent is allowed and not when the application is made. I will write him regarding the change to be made so he will know what has to be done before he gets any money or check. Now if things are not right just hold the check and have him write or phone to me for I want him to be satisfied as well as myself. Now I trust this to you as you will receive one-half of whatever I may receive so you see you will have an interest after all. The weather keeps cool and you bet I like it. It has tried to rain today but did not do much. How is Asa getting along, is his tobacco all gone yet? I trust some little fellow is well and not working to hard with best wishes, Love, Kisses and all the other little sings will bid you a fond and loving good night. Lovingly,

HARRY.

(Envelope)

H. B. Hill
Cascade Locks

Cascade Locks, Oregon Jul 27.

Mrs. Kathryn Smith,
408 Main Street,
Portland, Oregon.

DEFENDANT'S EXHIBIT "A"
(Copy)

Portland, Oregon, Dec. 22/16.

To Whom it May Concern:

This is to certify that I, the undersigned, H. B. Hill, have this twenty-second day of Dec., nineteen hundred sixteen have received from one Mrs. Kathryn Smith a deed for 7.58 acres more or less located in Clarke Co. State of Washington.

I, the undersigned, H. B. Hill, do hereby promise and agree to surrender and transfer said deed to one Mrs. Kathryn Smith upon the full payment of the consideration set forth in said deed and such other debts that might be incurred, such as taxes, assessments, etc.

Signed, H. B. HILL.

DEFENDANT'S EXHIBIT "B"
(Copy)

Mortgage

THE MORTGAGOR, KATHERINE ANDERSON, a spinster, of Vancouver, Clarke County, Washington, mortgages to JOHN KRAMER, of Vancouver, Clarke County, Washington, the following described real estate, situate in the County of Clarke, State of Washington, to-wit:

Beginning thirty-seven and forty-two hundredths (37.42) chains East and fifteen and sixty-eight hundredths (15.68) chains South of the Northwest corner of Section Ten (10) in Township Two (2) North of Range One (1) East of the Willamette Meridian, and running thence South four and thirty-two hundredts (4.32) chains to the Southeast corner of the Hannah J. Tyszkiewicz tract thence East seventeen and eighty-one hundrdeths (17.81) chains, more or less, to the center of the County Road; thence North 7 degrees 45 minutes West along the center of said road four and thirty-six hundrdeths (4.36) chains; thence West seventeen and twenty-eight hundredths (17.28) chains, more or less, to the place of beginning, containing seven and fifty-eight hundrdeths (7.58) acres, more or less, to secure the payment of the sum of FIVE HUNDRED ($500.00) Dollars, and the interest thereon, in accordance with the tenor of a certain promissory note of which the following is a copy, to-wit:

$500.00 Vancouver, Wash.
September 21st, 1912.

Two years.....after date, without grace, for value received I jointly and severally promise to pay JOHN KRAEMER or order, at the Vancouver National Bank of Vancouver, Washington, Five Hundred ($500.00.....Dollars With interest from date until paid at the rate of 8% per cent per annum, interest payable annually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. If not so collected, the interest to be added to and become part of the principal, and the same to bear interest thereafter, until paid, at the rate of 8% per cent per annum. Principal and interest payable in U. S. Gold Coin. And in case action is commenced to enforce payment of this note or any portion thereof I jointly and severally, promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees. It is especially agreed and consented to that a deficiency judgment may be taken in a suit upon this note.

KATHERINE ANDERSON.

P. O. Vancouver, Wash.
Due September 21, 1914.

It is especially agreed and consented to that a deficiency judgment may be taken in a suit foreclosing this mortgage.

Dated this 21st day of September, A. D. 1912.

KATHERINE ANDERSON (Seal).

Executed in presence of:

L. M. BURNETT,
M. M. RICHARDSON.

State of Washington
County of Clarke } ss.

I, L. M. Burnett do hereby certify that on this 21st day of September, A. D. 1912, before me personally appeared Katherine Anderson, a spinster, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that she signed and sealed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and Official Seal, this 21st day of September, A. D. 1912.

(Notarial Seal) L. M. BURNETT,

Notary Public in and for the State of Washington, residing at Vancouver in said County.
Endorsed:

No. 59774

MORTGAGE

From Katherine Anderson to John Kraemer

Dated Sept. 21st, 1912.

I hereby certify that the within instrument was filed for record on the 21st day of Sept., 1912, at 1 o'clock

P. M., and recorded in Book 99 Records of Mortgages, page 265 at request of M. M. Richardson.

WM. M. MARSHALL,
Auditor and Recorder.

By.....Deputy.

Recorder's Fees, 90c.

Satisfied in full this 20th day of October, 1915.

MAY R. HAACK,
County Auditor.

DEFENDANT'S EXHIBIT "C"
(Copy of Letter)

COLUMBIA & NORTHERN FISHING AND PACKING COMPANY

Altoona, Washington, July 28/18.

Mrs. Kathryn Smith, Portland, Oreg.

Dear Mrs. Smith:

I have your letter of some recent date making inquries as to the amount of money I have advanced you and which I hold your property as security for. I beg leave to state that I have paid and loaned to you more than one thousand dollars, but if you can possibly redeem the property by Jan. 1st, 1919, I will be willing to settle for a thousand.

Trusting you will be able to make a settlement by the first of next year, as I am anxious to get the matter settled. Very truly yours,

H. B. HILL.

(Envelope)

H. B. Hill
Columbia & Northern Fishing
and Packing Company
Altoona, Wash.
U. S. America.

Altoona
Jul 30
A. M. 1918
Wash.

Mrs. Kathryn Smith,
472 Salmon St.,
Portland, Oreg.

DEFENDANT'S EXHIBIT "D"
(Copy of Letter)

WM. P. LORD
Attorney at Law
Suite 711 Lewis Building
Portland, Oregon

January 22, 1919.

Mr. H. B. Hill,
c/o Columbia & Northern Fishing & Packing Co.,
Altoona, Wash.

Dear Sir:

Mrs. Kathryn Struett has conferred with me in relaton to declaring the conveyance which you hold from her conveying certain real property in Clark County,

Washington, a mortgage, and that the legal title to this property be declared to her subject to your lien for the consideration set forth in the conveyance, together with taxes and assessments.

Under your letter of July 28th, you say that you will re-convey this property upon the payment of $1000 on or before the first day of January, 1919; but as I construe the facts as they have been submitted to me, the only money that Mrs. Struett is required to pay is the amount expressed in your declaration of trust under date of December 22, 1916. The facts are, that any sums in addition to the sums indicated, were in the nature of presents and gifts on your part; consequently, the purpose in writing you this letter is to demand a re-conveyance of this property together with an accurate statement from you of the consideration paid by you for Mrs. Struett's benefit at the time of the execution of the deed.

If this matter is not attended to in the immediate future, I shall be constrained to commence suit against you to declare this conveyance a mortgage.

Yours very truly,

L/M WM. P. LORD.

DEFENDANT'S EXHIBIT "E"

No. 6877

Treasurer's Office, Clarke County, Washington

Statement of All Taxes for State, County, City, Town, School and Road for the YEAR 1916:

Roll 1, Page 57, Line 44, Subdivision No. 53, Anderson D. L. C., Acres 7.58, Valuation $380, Tax $14.82.

PAID June 2nd, 1917. Duplicate

Katherine Anderson
3rd and Montgomery
Portland, Ore.

No. 134

Treasurer's Office, Clarke County, Washington

Statement of All Taxes for State, County, City, Town, School and Road for the YEAR 1917.

Roll 1, Page 61, Line 29, Subdivision W. R. Anderson DLC No. 53, Acres 7.58, Valuation $380, Tax $14.82.

PAID Feb. 5, 1918
L. G. CONANT, Treasurer.

No. 5959

Treasurer's Office, Clarke County, Washington

Statement of All Taxes for State, County, City, Town, School and Road for the YEAR 1915.

Roll 1, Page 65, Line 52, Subdivision Anderson DLC No. 53, Acres 7.58, Valuation $420, Tax $16.80.

PAID May 31, 1916

L. G. CONANT, Treasurer.

Certificate of Redemption from Delinquency Sale

State of Washington
County of Clarke } ss.

CERTIFICATE OF REDEMPTION

Vanco, Wash., June 3rd, 1916.

Received from Katherine Anderson By Surrender No. Dollars in full for Redemption of the property hereinafter described, sold for the delinquent State, County, Municipal and all other Taxes for the years 1913 on the 18th day of October, 1915, and purchased by John Kraemer and Certificate of Delinquency No. 316 issued therefor. The above sum includes the amount of the Certificate of Delinquency, together with all Taxes, Assessments and Costs paid by the holder of the same subsequent to issuance thereof, with interest on the same to date, as per statement set forth herein.
Statement Showing Taxes which Redemption Covers

Description: Sec. or lot, Twp. or Blk., Range, Acres.

Cert. of Del. No. 316 for Taxes of 1913.

Redeemed by Surrender of Cert. No. 316.

I hereby certify that the above described property has this day been redeemed from the sale above mentioned.

In Witness Whereof I have hereunto set my hand and seal this 3rd day of June, 1916.

(Seal) L. G. CONANT, County Treasurer.
By M. B. KIESS, Deputy.

$30.00 1623

Seattle, Washington, Mar. 26, 1919.

Received from Wm. P. Lord, Attorney Proctor for Complaint the sum of $30.00, on account of Clk. and Marshal's Fees in the case of Kathryn Struett vs. Harry B. Hill, No. 85-E.

U. S. District Court, Western District of Washington.

F. M. HARSHBERGER, Clerk.
By ED. M. LAKIN, Deputy.

C. B.—

Docket El-85.

DEFENDANT'S EXHIBIT "F."
(Copy)

KATHRYN STRUETT
To
HARRY B. HILL, Dr.

Oct. 20, 1915: Took up mortgage, paying	$801.00
July 15, 1916: Loan, to buy rooming house	200.00
May 31, 1916: Paid 1915 taxes	16.80
June 3, 1916: Paid 1916 taxes	14.82
Feb. 5, 1918: Paid 1917 taxes	14.38
	$1,047.00
Interest at 6 per cent from October 20, 1915, to October 29, 1919 on $801	$193.16

Interest at 6 per cent on $200 from July 15, 1916 to October 29, 1919	40.40
Interest at 6 per cent on $16.80 from May 31, 1917, to October 29, 1919	3.42
Interest at 6 per cent on $14.82 from June 3, 1916, to October 29, 1919	3.03
Interest at 6 per cent on $14.38 from Feb. 5, 1918, to October 29, 1919	1.48
TOTAL	$1,288.49

State of Washington }
County of Pierce } ss.

L. D. Heflin, being first duly sworn, says:

I was the official and acting court reporter in the trial of the above entitled cause before the Honorable E. E. Cushman, one of the judges of the above entitled court, and as such court reporter made a full, true and accurate shorthand record of the oral testimony, motions, objections, rulings, exceptions and other proceedings had and done in said trial; and that the above and foregoing is a true and correct transcript of my said shorthand notes of the oral testimony and other proceedings above referred to take by me in shorthand as aforesaid, together with correct copies of the exhibits offered and received in evidence.

L. D. HEFLIN.

Subscribed and sworn to before me this 26th day of August, 1920.

ED. M. LAKIN,
Deputy Clerk of the Above Entitled Court.

And Thereafter, to-wit, on the.....day of December, 1920, there was duly filed in the District Court of the United States for the District of Washington, Southern Division, a

CERTIFICATE TO TRANSCRIPT OF RECORD ON APPEAL

in words and figures as follows, to-wit:

(Title Omitted)

The attorneys for the respective parties to the within and foregoing entitled cause, having stipulated that the within printed transcript of record, as prepared, compared and tendered to me for certification, by the attorneys for the plaintiff, appellent herein, is a true transcript of all the record, papers and proceedings had and taken in the above entitled court in the above entitled cause, including all of the Exhibits referred to therein; and the said attorneys having further stipulated that I shall certify the foregoing printed transcript in accordance with said stipulation and without comparison thereof:

Now, therefore, in accordance with the said stipulation and the rules of the above entitled court, I, F. M. Harshberger, Clerk of the District Court of the United States for the District of Washington, Southern Division, do hereby certify that the foregoing printed pages number from 1 to 190, inclusive, are a full, true and

correct transcript of the record, papers and proceedings had and taken in the above entitled court in the above entitled cause, as the same appears of record and are on file in my office and in my custody, including all of the Exhibits referred to therein.

And I do further certify that in accordance with the said order of the said United States Circuit Court of Appeals, I have transmitted to the clerk thereof, as a part of the record in said cause on appeal, all of the said Exhibits offered in evidence on the trial of said cause; and I further certify that the fee for certifying to the within transcript, to-wit, the sum of ~~fifty~~ $43.12 cents, has been paid, by the plaintiff, appellant herein.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Tacoma, Washington, in said district, this 26th day of ~~December~~ Jan., 1926.

F. M. HARSHBERGER,

Clerk of the United States Court, for the State of Washington, Southern Division.

By Ed. M. Lafean
Deputy Clerk

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CERTIFICATE OF COURT TO ABSTRACT OF TESTIMONY AND ORDER MAKING SAME PART OF RECORD

(Title Omitted)

Now, on this 19th day of January, 1921, the foregoing Transcript of Testimony, consisting of pages 1 to 190, having been presented to the undersigned Judge of said Court, who tried the cause, by the attorney for the plaintiff, and a copy of said Transcript of testimony having heretofore and in due course been served upon the attorneys for the defendant in this action and no exceptions or amendments having been made to said Abstract of Testimony, and the parties having stipulated as to the correctness of said abstract, the Court does now certify taht said abstract is a full, complete and correct abstract of all the testimony introduced by the parties on the hearing of said cause and constitutes all the substantial testimony herein material to the issue, and it is

ORDERED: That said Abstract of Testimony be and hereby is made a part of the record.

IT IS FURTHER ORDERED: That Exhibits 1 to 8 both inclusive, which/introduced in evidence were and marked as such Exhibits on the part of the Plaintiff, and Exhibits "A" to "I", both inclusive which were introduced in evidence and marked as such Exhibits on the part of the Defendant be and the same hereby is made a part of the Record.

Dated January 19th, 1921.

EDWARD E. CUNNIAM

Judge

NO. 3509

IN

The United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KATHRYN STRUETT, formerly
KATHRYN SMITH,
Appellant,

vs.

HARRY B. HILL,
Appellee.

MOTION FOR RULE TO SHOW CAUSE

WM. P. LORD, of Portland, Oregon,
Solicitor for Appellant.

JOHN W. ROBERTS, of Seattle, Washington,
Solicitor for Appellee.

FILED
AUG 16 1920
F. D. MONCKTON,
CLERK.

THE ARCADY PRESS AND MAIL ADVERTISING CO., INC.

NO.....

IN

The United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KATHRYN STRUETT, formerly KATHRYN SMITH,
Appellant,

vs.

HARRY B. HILL,
Appellee.

MOTION FOR RULE TO SHOW CAUSE

Now comes the above named claimant and prays for an order of this Court directed to the Honorable Edward Cushman, U. S. District Judge for the District of Washington, at Tacoma, Washington, that he be required to show cause at a time certain to be fixed by this court, why he should not approve the record of the evidence and proceedings in the above entitled cause, as held before him as District Judge, in equity sitting, and if the evidence and record lodged with the clerk by appellant be not complete or properly prepared for the purpose of the appeal, that the same shall be so made under the direction of the said Judge.

This motion is based on the following facts, to-wit: That after the issues were made in the said suit, in the said District Court, the same was tried before said Judge on the 29th day of October, 1919.

Thereafter and on the 20th day of November, 1919, a decree in said cause against the complainant was entered.

Thereafter, and on the 18th day of May, 1920, the said District Judge allowed an appeal to this Court, in said cause, upon the filing of a petition for an appeal, bond, assignment of errors, and citation on appeal.

That at the time of perfecting the appeal as above set forth, the complainant had not filed with the clerk of said District Court any statement of the evidence in said suit contemplated by Rule 75 of the Equity Rules promulgated by the U. S. Supreme Court at the October term, 1912.

Thereafter, and on the 10th day of June, 1920, the appellant filed with said District Clerk, a motion praying for a settlement of the record in said cause, and relieving the appellant from any default for failure to lodge the record with the clerk before the allowance of the appeal.

That a copy of said motion is hereunto attached marked exhibit "A" and hereby made a part of this motion. That said motion having been regularly served

on John W. Roberts, solicitor for respondent, the same was set for hearing, by the said District Judge, for June 28, 1920.

That thereupon, said motion was argued to the Court, and after hearing the arguments of counsel, said Judge made an order denying the said motion and refusing to approve the record, because the same had not been filed within 10 days after the entry of the decree in said cause, or within any extension of time allowed by the Court.

That prior to the argument of said motion complainant tendered appellee in open Court a full and true transcript of the testimony in said cause certified to by the Court reporter.

Respectfully submitted,

WM. P. LORD,
Solicitor for Appellant.

"EXHIBIT A"

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF WASHINGTON, SOUTHERN DIVISION

KATHRYN STRUETT, formerly KATHRYN SMITH, *Complainant,* vs. HARRY B. HILL, *Respondent.*	E-85 MOTION

Now comes the complainant above named and moves the Court for an order as follows:

(1) For an order permitting complainant to and including the 10th day of July, 1920, as time within which to file a record of the proceedings in this cause with the Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit.

(2) For an order relieving complainant from any default in settling the record in this cause and permitting the statement of complainant's case in the form of questions and answers.

(3) For an order permitting complainant to have the privilege of filing a bond on appeal satisfactory to the respondent herein.

This motion is based upon the affidavit of Wm. P.

Lord, hereunto attached, marked Exhibit A, and by this reference made a part of this motion.

WM. P. LORD,
Attorney for Complainant.

EXHIBIT A

UNITED STATES OF AMERICA
County of Oregon, } ss.

I, Wm. P. Lord, being first duly sworn, depose and say that on or about the 15th day of May, 1920, I requested A. D. Hoflin, the reporter who took the testimony in this cause to present to the Judge of the above entitled Court for signature the following papers for the perfection of the appeal in this cause, to-wit: Petition for Appeal; Order Allowing Appel; Assignments of Error; Citation on Appeal and Undertaking on Appeal, together with proposed orders as follows:

"IT IS ORDERED that the time for the said complainant to file the record of appeal in the above entitled cause with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and to docket the said cause with said clerk, be and the same is hereby enlarged and extended for a period of 17 days up to and including the first day of July, 1920.

"Dated this 17th day of May, 1920."

"IT IS ORDERED that the complaintant-appellant be, and she is, hereby allowed in her preparation and statement of the evidence on her appeal herein, to state such portions of the testimony of the witnesses in the above entitled cause in the exact words of the witnesses and in the form of the questions asked said witnesses and their answers thereto, as in the judgment of said appellant is necessary to preserve the true character and meaning of the testimony of such witnesses and such as the appellant may desire.

"Dated this 17th day of May, 1920."

That previous to this date and on the 20th day of April, 1920, I had requested Mr. Hoflin to prepare a transcript of the testimony in this cause and had also advised Mr. John W. Robert of counsel on the 15th day of May, 1920, that application for appeal would be made in this cause and enclosed him copy of all the papers as appear above set forth, including the proposed orders for extension of time to the first day of July, 1920 as time within which to file the record with the clerk of the Court of Appeals; that these papers were received by Mr. Roberts prior to the 18th day of May, 1920; that Mr. Hoflin requested Mr. Roberts to approve the foregoing orders and that he refused to do so; that he also so stated to Judge Cushman and that Judge Cushman would not sign the order for extension of time unless it was brought up by motion with notice to Mr. Roberts; that additional time was requested because Mr. Hoflin

had not completed transcribing the stenographic notes of the testimony taken in this cause on the 15th day of May, 1920, and did not complete the same until the 27th day of May, 1920; that I was required to attend the U. S. Circuit Court of Appeals in San Francisco during the May term and as a result I was away from my office for a considerable period of time during the month of May and I did not return to the city until the 11th day of May, 1920; that I did not know that Mr. Hoflin had not proceeded to transcribe the notes in this cause pursuant to my letter of April 20, 1920, above referred to until my return from San Francisco; when I returned to the city I found a letter from Mr. Hoflin making inquiries about the time limit for taking appeal; that immediately upon my arrival in Portland, it was necessary for me to perfect proceedings for a writ of error in the case of U. S. v. Vaughn, or otherwise the right to review would have been lost to the defendant in that cause; that I also had to prepare to try an embezzlement charge in the case of State v. Galloway; and as soon as I completed the perfection of that appeal I immediately proceeded to prepare the papers in this cause; that by reason of the foregoing facts I was exercising due diligence in taking this appeal and this appeal would have been perfected if it had not been for the fact that Mr. Heflin had not transcribed the stenographic notes in this cause pursuant to my letter of April 20, 1920; but he was of the opinion that the time for filing the appeal in this cause had elapsed by reason of the fact that he

computed the time from the 29th day of October, the date of the trial, instead of the 20th day of November, the date of the entry of the decree in this cause, and had written me making inquiries as to whether he should proceed with the making of the transcript, although I had already paid for the same, having sent the necessary moneys to cover the cost of the transcript in my letter of April 20; consequently there is no intention to delay this appeal; that on May 29th I asked Mr. Roberts to stipulate with me that instead of a statement of the evidence being made in this cause, the questions and answers of the respective witnesses might be used, so as to preserve the true meaning of the testimony and on June 2nd I received a reply from Mr. Roberts, as follows:

Re: *Struett vs. Hill*

> This will acknowledge receipt of your letter of May 29th with stipulation in relation to a bill of exceptions. I am returning you herewith this stipulation for the reason that your time for making and settling a bill of exceptions in this case has expired and I, therefore, cannot consent to anything in connection with the matter of either preparing or settling a bill of exceptions for appeal in this case.
>
> "Not waiving the question of time or jurisdiction, I am willing here to state to you that if you can now procure a record at all in the case I will then consent that it may go up in the manner which you have suggested, and in fact, would very much

prefer if it goes up at all that it should go in that form, but expressly reserve the right when you shall present this matter to the court to object to any record being now made or settled in the cause."

Notarial Seal

(Signed) WM. P. LORD.

"Subscribed and sworn to before me this 10th day of June, 1920.

"ALLISON MOULTON,
"Notary Public for Oregon.

"My commission expires May 13, 1924."

(Copy served on John Roberts, solicitor for respondent, by mail.)

No. 3[illegible]

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHRYN STRUETT, formerly KATHRYN SMITH,
Appellant,

vs.

HARRY B. HILL,
Appellee.

SPECIAL APPEARANCE OF APPELLEE TO MOTION FOR RULE TO SHOW CAUSE

JOHN W. ROBERTS,
E. L. SKEEL,
HARRISON B. ALLEN,
Attorneys for Harry B. Hill, Appellee, appearing here Specially only.
1301 Alaska Bldg., Seattle.

WM. P. LORD, of Portland, Oregon,
Solicitor for Appellant.

PRESS OF PLINY L. ALLEN CO., SEATTLE

FILED
AUG 28 1920
F. D. MONCKTON

No.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHRYN STRUETT, formerly KATHRYN SMITH,
Appellant,

vs.

HARRY B. HILL,
Appellee.

SPECIAL APPEARANCE OF APPELLEE TO MOTION FOR RULE TO SHOW CAUSE

Comes now Harry B. Hill, Appellee, and appearing here specially only and preserving at all times his special appearance, demurs to the so-called motion for rule to show cause on behalf of the appellant, and objects to this Honorable Court issuing the order therein prayed, for the following reasons:

I.

It appears from the record that this Honorable Court is without jurisdiction.

II.

No effort was made to present for settlement a statement or bill of exceptions until more than six months after the entry of final decree. There was no extension of time for settling bill of exceptions, and the Honorable Trial Court had lost all jurisdiction when said bill was presented, and this Honorable Court is therefore without jurisdiction.

III.

In the preface to the printed rules of this Circuit at page 8 is the following:

> "The principal object sought to be accomplished is two-fold: to furnish, so far as possible, a complete code of practice covering all cases not provided for by statute or by rules of the Supreme Court, *and to conform the practice in equity cases* to that in cases at law, so far as permitted by the statutes and the equity rules of the Supreme Court."

Rule 75 provides that a bill of exceptions may be made during the trial, or within such time as the Court or Judge may allow, by order made *at the time of the ruling*. It then provides:

> "If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: The party desiring the bill shall, *within ten days* after the ruling is made, or if such ruling was made during a trial then ten days after the rendition of the verdict, or if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the ad-

verse party a draft of the proposed bill of exceptions."

Rule 81 provides how and when extensions of time may be had, and is in part as follows:

> "When an act to be done in any action at law or *suit in equity* which may at any time be pending in this court relates to the pleadings in the cause or * * * the *preparation of bills of exceptions* or amendments thereto * * * be extended by the Court or Judge by order *made before the expiration of such time.*"

The time for appeal expires within six months.

Appellant in this case made no bill of exceptions at the trial, made none within ten days, made no application for an extension of within ten days, made no such application within the six months allowed for an appeal. We submit:

1. That appellant having asked for no extension of time within the ten days, the Court lost all jurisdiction to extend time.

2. But if we should be mistaken in this, appellant not having asked for an extension within the six months appeal period, the Trial Court certainly lost all jurisdiction to either settle the bill or to extend time.

We believe, aside from the rule of this court, the authorities are practically unanimous to the effect that where the full time within which an act may be performed has expired, such time may not then be extended. The extension must be within the limitation originally fixed.

There is an utter lack of showing of diligence. The case was decided October 29th. Final decree was entered November 20th. April 20th, exactly five months after decree and six months after the case was decided, counsel for appellant wrote a letter to the stenographer (see printed motion, page 9) asking the stenographer to transcribe the evidence in the cause. During this entire five or six months no effort whatever was made to prepare bill of exceptions. The stenographer, on receiving the letter of counsel, wrote him that he was not making the transcript because the time for appeal had expired (see printed motion, page 9).

The six months for appeal expired on May 20th, yet counsel made no effort after the time the stenographer advised him that his time for appeal had expired, to procure any extension of time for making bill of exceptions. On May 29th, nine days after the six months had expired for appeal, he requested Mr. Roberts, of counsel for appellee, to stipulate that instead of the statement of the evidence the questions and answers might be used. This Mr. Roberts refused, notifying him that his time for appeal had expired (printed motion, page 10).

Appellant made no move nor application to have a bill of exceptions settled in the cause until the 10th day of June, 1920 (printed motion, page 4). This was twenty days beyond the six months' appeal period before any effort whatever was made to present a bill of exceptions to the Court for settlement.

Counsel has at no time asked for an extension of time to make a bill of exceptions. Counsel in the mo-

tion says the Court denied it because the bill had not been prepared within ten days, but we presented to the Honorable Trial Court, as we are presenting here, the further question that it had neither been prepared nor presented within six months, and that no extension had even been asked.

Counsel in the motion prints on pages 7 and 8 two orders, but these orders were never signed by the Honorable Trial Court. They are merely forms of orders which he prepared. In the motion, page 8, it is stated that these orders were presented to Mr. Roberts prior to the 18th day of May, 1920, and that Mr. Roberts refused to approve them.

Counsel applied to the Trial Court for an extension of time in which to file his record in this court (printed motion, page 6), but that application included nothing in relation to a bill of exceptions, and was not and is not contended to have been an application for an extension of time for making and serving a bill of exceptions.

We submit, therefore, that the Honorable Trial Court was, on the 10th day of June, 1920, without any right, power or jurisdiction to settle a bill of exceptions, and was right in refusing so to do, and that he should not now be harrassed by being required to show cause in this court as prayed in the motion of appellant.

Most respectfully submitted,

JOHN W. ROBERTS,
E. L. SKEEL,
HARRISON B. ALLEN,
Attorneys for Harry B. Hill, Appellee, appearing here Specially only.

No. 3539

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHRYN STRUETT, formerly Kathrine Smith, *Appellant,* vs. HARRY B. HILL, *Appellee.*	No. 3539

Brief on Behalf of Appellee

JOHN W. ROBERTS,
E. L. SKEEL,
HARRISON B. ALLEN,
Attorneys for Harry B. Hill, Appellee.

1301 Alaska Bldg., Seattle.

WM. P. LORD, of Portland, Oregon,
Solicitor for Appellant.

PRESS OF PLINY L. ALLEN CO., SEATTLE

No. 3539

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHRYN STRUETT, formerly Kathrine Smith, *Appellant,* vs. HARRY B. HILL, *Appellee.*	No. 3539

Brief on Behalf of Appellee

The decision of the Honorable Trial Court, Transcript, pages 159 to 163, states all the argument necessary on behalf of appellee. We will cite briefly where, in the Transcript, this Court may find support for the conclusions of the Trial Court.

Appellant was forty years of age at the time of trial. (Tr. 45.)

When the relationship between appellant and appellee began, both were married. (Tr. 47, 48, 64, 65,

66.) The intimate relationship began in 1912, and her husband did not die until 1914. (Tr. 66.)

Each time he visited her, he paid her $5, $10 or $20. (Tr. 53, 54, 119.) But none of this money was included in the amount claimed.

That Hill paid the mortgage on her land is not disputed. That he paid the taxes is in no way disputed.

The name of appellant at the time was Smith.

The consideration named in the deed was $1000. (Tr. 163.)

On her giving him the deed, he gave back to her an instrument by which he agreed to re-transfer the property to her on payment of amount of consideration set forth in the deed. (Tr. 174.) She prepared the deed herself, went to a Notary Public, and had it acknowledged, and delivered it to Hill, and received back from him the document providing for reconveyance, on payment of $1000. Hill made no suggestion to her about where she should go to have the deed prepared or acknowledged, and he was not present. (Tr. 111, 114, 115, 125.) Hill paid the mortgage October 20th, 1912, and deed is dated August 10th, 1916. He paid all taxes after that, except the taxes of 1918. (Tr. 89, 99.)

Mrs. Smith was re-married before the trial, and her name at the trial was Struett. She was asked and answered as follows:

> "Q. Now you had this letter (meaning the agreement to re-convey) in your possession all

that time, from July 28th, 1918, until you started this suit, and yet you never at any time questioned the fact that you owed him this money, did you?

A. Why no."

She wrote Hill at Altoona, asking him how much she owed him at that time. On July 28th, 1918, he answered saying that it was more than a thousand dollars, but that if she would pay $1000, he would settle the whole thing. (Tr. 178, 179.) She went over to see him about it, and agreed to pay him the $1000: $500 cash and $500 within a day or two thereafter. (Tr. 79.)

It will be noted that up to that time she raised no question whatever about her honestly owing him more than $1000. She both wrote him, and went to see him, admitting the indebtedness. Later, she went to her attorney. She swore that she told her attorney the facts, and told them truthfully. (Tr. 90, 91.) After the attorney obtained the facts from her, examined the written instrument held by her, admitting the indebtedness, etc., the attorney wrote a letter to Hill, in which he stated that Mrs. Struett had conferred with him in relation to having the deed declared a mortgage, *"subject to your lien for the consideration set forth in the conveyance, together with taxes and assessments."* (Tr. 179, 180.) As proof that the attorney had before him the documents, he states in this letter:

"Under your letter of July 28th, you say that you will re-convey this property upon the

payment of $1000, but as I construe the facts as they have been submitted to me, the only money that Mrs. Struett is required to pay is the amount expressed in your Declaration of Trust, under date of December 22nd, 1916."

Note that her attorney, after she had truthfully given him the facts, and examined all the documents, admits that Mr. Hill is entitled to the $1,000, with all taxes and assessments, all of which it is admitted Mr. Hill had paid.

We have waited until the last date possible to receive brief from appellant, but have received none, and therefore can make no reply.

We respectfully pray an affirmance of the judgment.

Respectfully submitted,

ROBERTS & SKEEL,
HARRISON B. ALLEN,
Attorneys for Appellee.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KATHRYN STRUETT, Formerly Kathrine Smith,	Appellant,
vs.	
HARRY B. HILL,	Appellee.

Upon Appeal from the District Court of the United States for the District of Washington, Southern Division.

WM. P. LORD
Attorney for Appellant

GRIFFITH, LEITER & ALLEN and ROBERTS & SKEEL
Attorneys for Appellee

FILED
FEB 14 19[illegible]
F. D. MONCKTON, [illegible]

THE ARCADY PRESS AND MAIL ADVERTISING CO., INC.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KATHRYN STRUETT, Formerly Kathrine Smith,	Appellant,
vs.	
HARRY B. HILL,	Appellee.

Upon Appeal from the District Court of the United States for the District of Washington, Southern Division.

STATEMENT.

This suit was instituted to set aside a conveyance of certain real property in Clarke County, Washington, on the grounds that the conveyance was secured by the grantee by the abuse of a confidential relationship with the grantor, who was without independent advice, and upon representations constructively fraudulent. It is set out in the bill of complaint that on the 16th day of June, 1912, the complainant became possessed of certain real property, and on the 21st day of September, 1912, the plaintiff mortgaged the premises to one Kramer for a loan of $500, and on the 19th day of October, 1915, the mortgage was past due and the principal and in-

terest had not been paid and that proceedings had been instituted to foreclose the mortgage. On the 20th day of October, 1915, the respondent gave the complainant in Portland, Oregon, a sum of money to pay this mortgage, with which she paid this mortgage, and it was satisfied of record. The bill charged that for some years prior to the time of the satisfaction of the mortgage the parties were close and intimate friends; that Mrs. Smith was a widow and without means and was beset with financial difficulties and Mr. Hill, who represented himself as a married man, but separated from his wife, was an intimate friend of Mrs. Smith's sister and brother-in-law; that during these times the parties to this suit were engaging in all sorts of intimate relationships, and the respondent represented to Mrs. Smith and caused her to believe that he possessed an overpowering affection for her and had her interest at heart and his intentions towards her were honorable, and by reason thereof, she reposed unbounded confidence in his advice and opinions to such an extent that in her social and business affairs she acted in accordance with his advice and counsel.

That during the years 1915 and 1916 Mr. Hill's relations with Mrs. Smith were still more intimate and she was perturbed about her financial affairs and her relations with Mr. Hill, who represented that he would secure a divorce from his wife at a proper time; that he ingratiated himself with Mrs. Smith's relatives, who

importuned her to act in accordance with the counsel of Hill; that he was visiting with her at her home in Portland several days each month and during his absence was writing her affectionate letters; that she need not worry about her lack of success in business, as he would provide for her, and he was giving her small presents of money; that he was intrusting her with money to invest in some device which he was purchasing and was giving her some interest in it; that he had applied for an endowment insurance policy in the sum of $5,000 in which she was the beneficiary, and made her his heir in his will; that the mortgage was paid by money furnished by him and he informed Mrs. Smith that it was a present to her; that on October 20, 1915, he gave her the money to pay the Kramer mortgage and informed her that this was a present to her.

In Paragraph XII it is charged that between October 20, 1915, and August 10, 1916, in order that he might keep her under his control he represented to her that the property would be wholly lost to her by her improvidence unless she conveyed it to him, and, inciting her in her perplexity and distress and while under his influence and while she did not have independence of mind or resort to independent advice, in breach of the confidential relationship as confidential friend and apparent advisor, when really designing to act for his own interest and personal benefit, did induce and prevail upon her to make a deed to the premises without any consideration, pursuant to a secret intention to secure

the lands for himself, all of which was done in breach of the confidential relation between friend and friend when in relation of advisor, one to the other.

The respondent admitted in his answer the outstanding mortgage and the payment thereof and the conveyance of the property to him, but alleged that between January 1, 1914, and August, 1916, he loaned to complainant for her accommodation and at her request, without any time being agreed upon for repayment, sundry and divers sums of money aggregating $1,000. That the conveyance was given to him as security for the debt, and was intended to operate as a mortgage as security for the aggregate debt, and that he demanded payment of the money, and that refusal to pay was made, and judgment is prayed for $1,000 with interest and costs and that the deed be declared a mortgage and that the premises be sold on foreclosure.

ASSIGNMENTS OF ERROR

I.

The District Court of the United States for the District of Washington, Southern Division, erred in sustaining the respondent's objection to the receiving and admitting in evidence of certain exhibits referred to in the transcript of testimony herein.

II.

The Court erred in making Findings of Fact in

favor of the respondent and not in favor of the complainant.

III.

The Court erred in finding that the complainant failed to establish the allegations of her complaint and was not entitled to recover in this action, and in dismissing the complainant's complaint.

IV.

The Court erred in finding and in entering judgment against complainant and in favor of respondent for the sum of One Thousand ($1,000) Dollars and the further sum of twenty-nine and twenty-hundredths ($29.20) dollars with interest thereon at the rate of six (6%) per cent per annum from the 29th day of October, 1919, and in entering judgment and decree therefor in favor of the respondent and against the complainant.

V

The Court erred in finding that the certain deed filed for record on the sixth day of June, 1917, in the Records of Clarke County, Washingon, and recorded in Volume 120 of the Deed Records at page 587 thereof, wherein Kathrine Smith was grantor and Harry B. Hill was grantee, conveying the following described premises in Clarke County, Washington, to-wit:

(Description Omitted)

was given by the complaintant to the respondent to secure him the repayment of moneys advanced, which the Court found to be in the sum of $1,029.20 and was a mortgage to secure to respondent the payment of said sum with interest and costs of this suit, and in entering a decree declaring said mortgage to be a lien upon said described real premises, and directing that the same should be foreclosed and said property sold by the marshal in the manner provided by law, and in further ordering and adjudging that upon a confirmation of such sale a certificate of purchase issue to the purchaser, and that the complaintant be forever barred and foreclosed of any and all right, title, interest or equity of redemption in or to said premises.

VI.

That the decree is against the manifest weight of evidence.

VII.

The Court erred in holding and deciding that the complainant was not entitled to the relief prayed for in her complaint herein.

POINTS AND AUTHORITIES

The burden of showing that a deed absolute on its face was really intended as a mortgage rests upon the

one who asserts that to be a fact, which must be shown by clear and satisfactory evidence.

27 Cyc. 1017, 1018;

Albany, Etc., Co. v. Crawford, 11 Or. 243.

The intention of the parties is the governing factor. It is this which must be sought, and where it can be ascertained, it must prevail, and it is essential that the understanding and intention of both parties, grantee and grantor, should concur, to convert a deed absolute in its terms, into a mortgage.

27 Cyc. 1007.

ARGUMENT

The Court found he conveyance of August 10,1916, between the parties was given to secure a loan. We believe that there is not sufficient evidence that this conveyance was so intended. It is a rule without exception that the burden of showing that a deed absolute on its face was intended as a mortgage rests upon one who avers that fact, which must be shown by clear and satisfactory evidence; also upon the intention of the parties as determined from a consideration of the circumstances, pecuniary relations of the parties, their negotiations, their contemporaneous acts and declarations and subsequent acts and admissions.

With this preliminary statement of the law applic-

able to the case, let us turn to the facts and see whether the appellee has shown by clear and satisfactory evidence that this deed was intended as a mortgage, or did it not have a crafty purpose behind it. In reviewing the testimony we find intimate relations between the parties commencing back in 1912. In fact, Mr. Hill's attorney compelled her to admit that the relations between them were adulterous in their inception. Mr. Hill was an intimate friend of Mrs. Smith's sister and her husband, and according to his sworn testimony had been making his home at their house in Aberdeen, and had been loaning them large sums of money, and according to both Mrs. Smith's and Mr. Hill's testimony his relations at the home of Mrs. Smith's sister brought about the intimacy between them, and it was during his time that an adulterous intercourse commenced between them. Shortly afterwards Mrs. Smith's husband died. During these times Mr. Hill was holding himself out to Mrs. Smith as a married man and separated from his wife who was residing in the East and from whom he would secure a divorce at the proper time, although he swears on the stand that he was a single man when he first met Mrs. Smith.

Eventually Mrs. Smith moved to Portland and opened a small rooming house on money she borrowed from Hill. He made her home in Portland his home on his frequent trips to Portland, staying there nights and their relations during these times were not any more intimate than husband and wife, she explained.

The letters he wrote her show that he was making desparate love to her during his absence from her and were designed to retain her confidence and affection. These letters prove that he was purchasing a policy of insurance in which she was made the beneficiary, although he denied this on the stand; they also show that he was purchasing an interest in some device, promising her an interest in the profits derived from it and that he would take care of her financially in event it became necessary. She says that she never requested him to pay the Kramer mortgage in 1916, but he volunteered to pay it and she offered him a mortgage and he refused to take it and he told her that in paying it off he was making her a present.

During these times, she says that she felt toward him, "Just as I would my own husband, everything, everything in the world;" and he represented to her that he wanted to make a home on this particular property. He repeatedly told her not to worry about her pecuniary distress and was giving her small sums of money. These letters glow with the warmth of a youthful lover.

Mrs. Smith testified that the inducements made for the giving of the deed to Hill nine months after the payment of the Kramer mortgage were that: "He just says that I could have it for myself and that he would make a home of it, that there would not be a squabble over the property and we would have a home some day."

There is no creditable testimony to show that at the time the deed was made there was anything said about securing the money he had given her for the payment of the Kramer mortgage. It was her trust and confidence in him and his representations and professions that caused her to make the deed, and not because any security for advances was contemplated. No promissory note was taken, nor was the deed recorded until June, 1917.

If the deed was intended as security there certainly would have been some accounting and evidence of the indebtedness. Now, it is claimed that Defendant's Exhibit "A" is evidence of such understanding. But it bears date of December 22, 1916, over three months after the signing of the deed. Mrs. Smith says that it was sent to her through the mail along with some poetry on February 8, 1918 (Plaintiff's Exhibit No. 2), when their relations became estranged owing to attentions being paid her by her present husband, and that this paper was antedated. A man who had been guilty of playing fast and loose for years with this confiding woman was capable of attempting to perpetrate such a trick.

Now, the Kramer mortgage was paid on October 20, 1915, and on August 10, 1916, plaintiff made the deed in question to the appellee. It is to be noted that the letter of June 12, 1916, shows in what melancholy state of mind Mrs. Smith was at that time, and his reply contained such an assertion as "I have no desires to find

someone I could care more for. I only wish I was situated so we could be together, hope to be some of these days. I want to get a little money ahead so that we can go to some other part of the country."

I think the testimony shows that in August, 1915, Hill was desirous of continuing his relations with Mrs. Smith indefinitely and that he foresaw that unless he married Mrs. Smith these relations eventually would be interfered with or would become burdensome and that she would have occasion to sever them unless he had some hold on her and that the only way in which he could retain his influence over her was to cause her to believe that he had great regard and affection for her, and was unable to marry her, which was false, and to show his affection for her, he paid the Kramer mortgage, and caused her to believe this was a present to her, and had her believe that he had his life insured for her as a further evidence of his affection for her and at the same time he took advantage of her confidence in him growing out of these representations and his supposed generosity to secure a deed when he could accomplish it, without arousing her suspicions, to protect him in event these relations were broken off, for the money which he had given her. Mrs. Smith was an easy victim of his scheme and it never occurred to her that Hill was craftily attempting to protect himself for money given her, and at a future time he would demand a return of the money he caused her to believe he had given her. If these were his intentions, and they are abund-

antly established by the testimony in the record, there is nothing in the record to show that this deed was intended as a mortgage as contended for by him. On his part, the securing of the deed from her was deception based upon confidence, and false representations and promises as to his intention for the future, and not because they had agreed between themselves that the deed should operate as a mortgage. The courts should not be made an instrument to enforce the deception.

Respectfully submitted,

WM. P. LORD.

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No. 3540

In the

United States Circuit Court of Appeals

For

The Ninth Circuit

WILLIAM E. GOWLING,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Brief and Argument on Behalf of Plaintiff in Error

FRANK A. DURYEA,
Berkeley, California,
1904 Grant Street,
Attorney for Plaintiff in Error.

In the

United States Circuit Court of Appeals

For

The Ninth Circuit

WILLIAM E. GOWLING,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error by which William E. Gowling, plaintiff in error, hereinafter called the defendant, seeks a review of the sentence and judgment entered against him in the United States District Court for the Northern Division of the Northern District of California on the 25th day of May, 1919, whereby he was sentenced to imprisonment at McNeils Island, Washington, for a period of three (3) years and to pay a fine of Two Thousand Five Hundred dollars. (Tr. p. 25.) The defendant has been confined at said McNiel's Island for more than one year last past in execution of said sentence.

The defendant was indicted by the grand jury of said district upon five (5) counts based upon a single alleged act of transportation, the first of which said counts (omitting the preliminary and concluding paragraphs) is as follows:

"That William E. Gowling, otherwise known as W. E. Gowling, late of Sloat, California, on to wit, the third day of October, in the year of our Lord one thousand nine hundred and eighteen, unlawfully wilfully, feloniously and knowingly did transport and cause to be transported and aid and assist in transporting in interstate commerce, that is to say, from Reno, in the State of Nevada, to Sloat, in the State of California, through the said Northern Division of the said Northern District of California, in and by means of a certain automobile running over the public highways of the United States, the owner of which said automobile is to the Grand Jurors aforesaid unknown, and which said automobile was then and there in such transportation run, operated, driven and controlled by the said defendant, William E. Gowling, as aforesaid, a certain woman, to wit, Mrs. Myrna Northcutt, otherwise known as Mrs. W. E. Gowling, for a certain immoral purpose, to wit, for the purpose of debauchery."

The remaining four counts, in their charging parts, are worded exactly the same as the charging part of the first count, as above set out, with the exception that the alleged *purpose* of the alleged transportation is in each count different, to wit: In the second count the purpose is alleged to be "of having un-

lawful sexual intercourse with her;" in the third count, "of having the said Mrs. Myrna Northcutt * * * become and be the concubine and mistress of the said defendant"; in the fourth count, "with the intent and purpose to induce, entice and compel the said woman * * * to give herself up to debauchery"; and in the fifth count, "with the intent and purpose to induce, entice and compel the said woman * * * to be and become the mistress and concubine of the said defendant, and to live and cohabit with him, the said defendant." (Tr. p. 3.)

To this indictment the defendant demurred generally and specifically, to wit:

"I. Upon the ground that said indictment does not, nor does either or any of the several counts thereof, state facts sufficient to constitute an offense against any law or laws of the United States of America.

II. That said indictment, and each and every count thereof, is uncertain in this: That it does not appear therein, and it can not be ascertained from said indictment or from either or any of said counts, whether or not the woman named therein is, or was at the time of the alleged offense, the wife of the defendant.

III. Uncertainty in this: That it does not appear therein, and it can not be ascertained from said indictment nor from either or any of the said counts, whether the automobile alleged to have been run, operated, driven and controlled by the defendant in the alleged transportation of the woman therein

named, was at the time of said alleged offense, or at all, engaged, or was being used, run, operated, driven, or controlled, in interstate commerce." (Tr. p. 8.)

The demurrer was overruled and the defendant pleaded not guilty (Tr. p. 10). a trial was had which resulted in a verdict of "guilty as charged"; a motion for a new trial was made and denied (Tr. p. 27), and the defendant sentenced as aforesaid.

The record shows that the defendant and Mrs. Northcutt were first cousins; that they had been in each other's company a great deal at Superior, Wis., the home of the Northcutts and Mrs. Northcutt's family, the Pattisons; and at Ely, Minn., where the Pattisons owned a mine which was being worked by Byron M. Pattison and Northcutt; that they became very much attached to each other, in fact were in love with each other. In 1917, about July, Northcutt sailed for France, and the defendant came West and located at Sloat, California, where he became interested in some mining property. In the fall of 1917, Mrs. Northcutt, with her children and governess, went to San Diego, and on her way stopped off at Sloat to look over the mining property with the end in view of investing some money in the same. She was there three days and then went to San Diego. Later she returned to Superior, Wis., and from there forwarded several thousand dollars to the defendant at Sloat to invest for her in the mining property, which he did. In the early part of 1918, Mrs. Northcutt, after spending the winter in Southern California, went to Sloat, with her children (a

third child having been born on April 6th, 1918, and within nine months from the time she last cohabited with her husband) and established herself in a house at the mine, living therein with her said children and governess alone, and took an active interest and part in the mining operations. About September 1st, 1918, it became necessary for the defendant to go to Duluth, Minn., to defend a civil action brought there against him by Mrs. Northcutt's brother, Byron M. Pattison. Mrs. Northcutt desired to make a visit East, and decided to go at the same time, and her friend, Miss Verna MacLeod, a reporter on the "Enterprise," a newspaper at Riverside, Cal., went with them at Mrs. Northcutt's invitation. Mrs. Northcutt purchased *round trip* tickets for herself and Miss MacLeod, and the defendant purchased *round trip* tickets for himself and Thos. Sullivan, a witness in the said lawsuit. They all drove to Reno, Nev., in Mrs. Northcutt's private automobile, left the car there, and took the Southern Pacific train East. After the trial of said case, the defendant, instead of returning direct to Sloat, went to Arizona to see about raising more money for the mine, and from there returned to Sloat. About October 2nd, 1918, Mrs. Northcutt, her children, Miss MacLeod, and Thos. Sullivan arrived at Reno on their return from the East, and the defendant met them there, and the next day drove Mrs. Northcutt and her children in Mrs. Northcutt's said private automobile back to Sloat, where Mrs. Northcutt resumed her residence under the same conditions as before. (Testy. of Mrs. Northcutt, Tr. pp. 307-400.) This was the trip—

the return to Sloat from Reno in Mrs. Northcutt's private car—which was made the basis of the charge of "transportation in interstate commerce for immoral purposes."

SPECIFICATION OF ERRORS.

The defendant, as it appears from the transcript herein (Tr. pp. 30, *et seq.*) has assigned eighty-four errors. In the argument counsel will confine himself to a few of the most serious errors assigned, relying, however, upon each and all of the errors assigned as appears by the transcript. The following errors will be discussed in this brief, to wit:

1. The court erred in overruling the demurrer to the indictment, and in not sustaining said demurrer. (Ass. of Er., I and II; Tr. pp. 8-10.)

2. The trial court erred in asking the following question of defendant's witness, R. S. Briscoe: "A small reputation or a small place?" and in failing to properly instruct the jury in regard thereto. (Ass. of Er. XIX and XX; Tr. p. 232.)

3. The trial court erred in refusing to grant the motion of defendant's counsel to strike out all testimony in the case tending to deny the legitimacy of the youngest child of C. A. Northcutt and Mrs. Myrna P. Northcutt, his wife, and to instruct the jury to disregard the same. (Ass. of Er. XL; Tr. pp. 374 to 376 inc.)

4. The trial court erred in overruling the objection of defendant's counsel to the following argument of the prosecuting attorney in his opening ad-

dress to the jury upon the close of the taking of the evidence in the case, and in approving of said line of argument of said prosecuting attorney, and in failing to instruct the jury to disregard said line of argument, to wit: "Now, gentlemen of the jury, can you, as twelve honorable men, chosen by reason of that very fact, say that William E. Gowling, this defendant, is innocent of the charge your government has brought against him; is innocent of sneaking into the home of his friend and relative and there destroying the very ties that bind the husband and wife together; is innocent of taking advantage of the trust and confidence of Carleton Northcutt, who left his home and friends and relatives and all that there was—" (Ass. of Er. LVI; Tr. pp. 407 to 409.)

5. The trial court erred in failing and refusing to reprimand the prosecuting attorney for using the following language in his closing argument to the jury, which was spoken of the counsel for the defendant, to wit: "And that is one of the cleverest things he did during the whole trial, except one which the law forbids me to mention, gentlemen of the jury."; in this that said statement and argument was calculated to and did refer to the fact that the defendant did not testify in the case, and was intended to influence the jury to believe that had the said defendant testified it would have been the worse for him. (Ass. of Er. LIX; Tr. p. 410.)

6. The trial court erred in refusing and failing to reprimand the prosecuting attorney for his reference in his closing argument to the fact that the

defendant had not testified in his own behalf, and in failing to properly instruct the jury that such argument was error and to disregard the same, to wit: "Now, it was stated by Mr. Duryea that there was someone here that was willing to drag this little woman through the mire of this action and brand her as a white slave, and I want to tell you that there is somebody here that is willing to do that, and that somebody is Frank Duryea and the defendant here, because she was brought here so that the defendant could hide behind her skirts, and put on that witness stand, and she was left alone to bear the brunt of this whole proposition on that witness stand alone." (Ass. or Er. LX; Tr. pp. 410 to 411.)

7. The trial court erred in giving to the jury those parts of the following instruction printed in italics, to wit: "The defendant is on trial under an indictment charging him with a violation of what is designated and commonly referred to as the White Slave Traffic Act, being an act of Congress intended and having the purpose to suppress the transportation in interstate commerce of women or girls for immoral purposes and thus protect the commerce of the country from being subjected to such contaminating influence. *That act, so far as here involved, provides, in substance, that any person who shall* knowingly transport or cause to be transported, in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute, or to give herself up to de-

bauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain or cause to be procured or obtained, or aid or assist in procuring or obtaining, any form of transportation, to be used by *or on behalf of* any such woman or girl in interstate commerce, in going to any place for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery or any other immoral practice, whereby any such woman or girl shall be transported in interstate commerce; or who shall *persuade, induce or entice, any such woman or girl to be so transported in interstate commerce for any such immoral purpose; is deemed guilty of a public offense.*" (Ass. of Er. LXI; Tr. pp. 411-412.)

8. The trial court erred in giving to the jury those parts of the following instruction printed in italics, to wit: "*The statute, as you will note, is very comprehensive on the subject of which it treats, and covers several distinct and different acts, each one of which is made a criminal offense under its provisions;* first, the transporting or aiding in the transportation in interstate commerce of a woman or girl for such immoral purpose or with the intent to induce, entice or compel her to give herself up to such immoral purpose; second, procuring or aiding in procuring a ticket or other form of right to transportation, to be used by such woman or girl in interstate commerce for such immoral purpose, or with the

intent to induce, entice or compel her to give herself up to such practices, and whereby she shall be transported in interstate commerce; *and, third, the persuading, inducing or enticing any such woman or girl to be so transported in interstate commerce for such immoral purpose. All of these different acts constitute separate offenses under the statute.* Under the first it is an offense to transport or aid in the transportation of such female for the purpose denounced, *whether she goes of her own volition, that is, willingly, or is induced to go by the means stated in the statute,* and whether she is to commit the immoral acts specified with the person so transporting her or with some other person or persons; under the second it is an offense to procure or aid in the procuring of the means of transportation of such woman, whereby she is transported or carried for such unlawful purpose, *and this whether she goes willingly or is induced by some one of the means mentioned in the statute to undergo such transportation,* whether it is intended that she shall commit the immoral acts with the one so procuring of such means of transportation or with some other person or persons; *and under the third phase of the statute it is an offense to persuade, induce or entice such woman or girl to be so carried or transported for such immoral purpose whether the act of immorality is to be committed with the person so persuading, inducing or enticing her or with another or others."* (Ass. of Er. LXII; Tr. pp. 413-414.)

9. The trial court erred in giving the following instruction to the jury, to wit: "As to the third

phase of the act referred to, that of persuading, inducing or enticing, it is not essential to guilt under these terms that any particular method shall be employed. The terms persuade, induce and entice are used in the statute in their ordinary, popular sense, and imply the arts of entreaty, protestations of affection, allurement, promise of marriage, or similar means to influence the mind or inclination of the woman and induce her to consent to be transported for such immoral purpose." (Ass. of Er. LXIII; Tr. pp. 414-415.)

10. The trial court erred in giving to the jury those parts of the following instruction printed in italics, to wit: "The indictment in this case is framed in five separate counts, *which you will find to cover and include the several acts denounced in the statute as I have outlined them above,* and charges the acts of the defendant as having relation to one Mrs. Myrna Northcutt, with references to whom it is charged the statute has been violated by such defendant. The uniting of the several different acts or offenses charged in one pleading or indictment is proper under the Federal statutes." (Ass. or Er. LXIV; Tr. p. 415.)

11. The trial court erred in giving to the jury those parts of the following instruction printed in italics, to wit: *"These different counts are intended to meet the different phases of the act which I have defined to you* and enable the jury to apply the evidence to the charge in an intelligent and discriminating manner and determine the facts as to the guilt or innocence of the defendant *under the different*

phases of this act, the only difference between the counts being the specific intent alleged. You will observe that each one of these counts *covers an act committed* on the same date by the same means, between the same points, and with reference to the same woman, the only difference in each count being the form and the specific intent with which that *act was committed,* and that is permitted to be done, that character of indictment is permitted to be filed, because it can not in many instances be known by the grand jury precisely what the evidence will disclose as the specific intent of the defendant, *and so it is permitted to be charged in the various forms which are justified by the terms of the statute."* (Ass. of Er. LXV; Tr. pp. 416-417.)

12. The court erred in giving the following instruction to the jury, to wit: "It is immaterial under the statute here involved what the character of Mrs. Northcutt was at the time of the acts charged, so long as the intent with which such acts were done is shown to the satisfaction of the jury; that is to say, if it appears in this case to your satisfaction that the defendant committed the acts charged in any one or more of these counts for the illegal purpose alleged therein, it is wholly immaterial, except in so far as it may affect your consideration of her testimony, or the motive with which she was sought to be transported, whether Mrs. Northcutt had previously had sexual intercourse with the defendant or not or was yet entirely chaste. In other words the Act in question denounces the carrying in interstate commerce, for the immoral purposes specified, of any

woman or girl, and a defendant violates the Act when he does any of the things prohibited thereby, regardless of the fact as to whether the woman or girl who is the subject of his act had been previously lewd in her conduct, or whether or not he has himself previously had illicit intercourse with her. The act is intended primarily to suppress the traffic against which it is aimed and to keep our interstate traffic pure, and incidentally is intended as much for the protection from further temptation and wrong of a woman who has already been seduced to a lewd ccurse as for those whose lives have previously been innocent of wrong." (Ass. of Er. LXVII; Tr. p. 420.)

13. The court erred in giving the following instruction to the jury, to wit: "The law, in its charity, presumes the innocence of a defendant, and that presumption abides with him throughout the trial, and until his guilt is established by the evidence." (Ass. of Er. LXVIII; Tr. p. 421.)

14. The court erred in refusing and failing to give to the jury the following instruction No. 2 requested by the defendant, to wit: "I instruct you that the terms 'debauchery,' 'concubine,' 'mistress,' and 'cohabit,' as used in the indictment, have the following definitions and must be so regarded and treated by you in arriving at a verdict in this case: 'Debauchery' means that the woman is to be subjected *repeatedly* to unlawful sexual intercourse or fornication or adultery. A 'concubine' is a woman who cohabits with a man without being his wife; a kept mistress, that is, a woman who is kept by a

man for the purposes of unlawful cohabitation. A 'mistress' is also defined as a woman who unlawfully or without marriage fills the place of a wife, and who is kept and supported by the man as his paramour. 'Cohabitation' is the dwelling and living together of a man and woman as though married, and with the appearance of being married and having sexual intercourse more or less continuously." (Ass. of Er. LXXI; Tr. pp. 430 and 432.)

15. The court erred in refusing and failing to give to the jury the following instruction No. 4 requested by the defendant, to wit: "You are instructed that the defendant is presumed to be innocent of the crime charged against him, and you must give to the defendant the benefit of this presumption of innocence throughout the entire progress of the trial, and until it is overcome by evidence in the case proving his guilt to your entire satisfaction and beyond a reasonable doubt, and not until then is this presumption of innocence removed or set aside." (Ass. of Er. LXII; Tr. pp. 430 and 433.)

16. The court erred in refusing and failing to give to the jury the following instruction No. 18 requested by the defendant, to wit: "I charge you that Mrs. Northcutt had the right to go to Sloat, California, and to the property of the Feather River Gold Mines Company for business purposes, and to establish a temporary or permanent home there if she chose to do so, and if you find from the evidence that she did go there for business purposes, and that she did invest in the said mining company property and become a stockholder therein, you must consider that

circumstance in determining whether or not she was there for any immoral or indecent practices in connection with the defendant." (Ass. of Er. LXXVIII; Tr. p. 430 and 435.)

17. The court erred in refusing and failing to give to the jury the following instruction No. 19 requested by the defendant, to wit: "You are instructed that if you believe from the evidence that Myrna P. Northcutt had an established home at or near Sloat, California, and at the time alleged in the indictment was returning to her home and was aided or assisted by defendant, but not for the purpose alleged in the indictment, you must find defendant not guilty, even though you may believe there is some evidence in the case tending to show immoral acts between them thereafter." (Ass. of Er. LXXIX; Tr. pp. 430 and 435.)

18. The trial court erred in failing and refusing to give to the jury defendant's requested additional instruction No. 1, to wit: "You are instructed that the issue of a wife cohabiting with her husband who is not impotent is indisputably presumed to be legitimate. The word 'cohabiting' in this connection means the living together of a husband and wife and neither of them is a competent witness to prove the absence of sexual intercourse during their cohabiting nor that a child born as a result of such cohabitation was the illegitimate child of another man if the husband is not shown to have been impotent. The presumption thus established is not to be rebutted by circumstances which only create doubt and suspicion but it may be wholly removed by proper and

sufficient evidence showing that the husband was

1. Impotent.

2. Entirely absent so as to have no intercourse, or communication of any kind with the mother.

3. Entirely absent at the period during which the child must in the course of nature have been begotten.

4. Only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." (Ass. of Er. LXXXII; Tr. pp. 430 and 436.)

19. The trial court erred and abused its discretion in denying defendant's motion for a new trial in this:

(a) That the verdict is contrary to law because the indictment does not state facts sufficient to constitute an offense under any law of the United States, in this, that it is alleged in the indictment and in each count thereof that the transportation of the woman, Mrs. Myrna Northcutt, was accomplished by means of a private automobile, and it is not shown that said automobile was then and there being used in interstate commerce;

(b) That said verdict is not supported by the evidence in the case, in this, that there is not sufficient evidence in the case to support a finding that the defendant, at the time he drove Mrs. Myrna Northcutt's private automobile from Reno, Nevada, to Sloat, California, on October 3rd, 1918, as alleged in the indictment, and with the said Mrs. Myrna

Northcutt in the said automobile, intended at said time to transport the said Mrs. Myrna Northcutt in interstate commerce or at all for the immoral purposes or any of them alleged in the indictment;

(c) That the court upon the trial of said case admitted incompetent and immaterial evidence offered by the United States to the prejudice of the defendant;

(d) That the court upon the trial of the case excluded competent and material evidence offered by the defendant, to the prejudice of the defendant;

(e) That the court improperly instructed the jury to the defendant's prejudice;

(f) That the court improperly refused, to the defendant's prejudice, to give correct instructions to the jury requested by the defendant;

(g) That the court improperly permitted counsel for the government to argue to the jury immaterial and irrelevant matters not in issue and which tended to and did improperly influence the jury to the defendant's prejudice. (Ass. of Er. LXXXIII; Tr. pp. 27 and 24.)

ARGUMENT.

We shall discuss the foregoing specifications in their order.

1. The demurrer to the indictment should have been sustained for the reason that said indictment and each count thereof shows on its face that the alleged transportation was not in "interstate commerce" within the meaning and intent of the Act.

The indictment was drawn under the provisions of certain portions of the "White Slave Traffic Act," to wit, certain provisions of Sec. 2 of that Act as follows:

> Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist * * * in transporting, in interstate * * * commerce * * * any woman or girl for the purpose of * * * debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to * * * give herself up to debauchery, or to engage in any other immoral practice, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished etc. (36 St. L. 825.)

It is not alleged or shown in the indictment that the automobile was engaged in interstate commerce, or was a common carrier, and we contend that it must be so shown in order to state an offense within the intent of the statute. It will be contended, no doubt, that that question has been decided by the Supreme Court adversely to our said contention in the case of Wilson vs. U. S., 232 U. S. 563, 58 L. Ed. 728, and it has been generally so supposed. But a careful analysis of the subject and the said decision will show otherwise. In that case, Wilson vs. U. S., *supra,* the point was raised that because the transportation was had over the line of an interstate "electric railroad" which had been, in the civil action of Omaha & C. B. Street R. Co. vs. Interstate Commerce Commission, 230 U. S. 324, 57 L. Ed. 1501, held not to be a "common carrier" within the pro-

visions of the Interstate Commerce Act, the defendant in the Wilson case was not therefore guilty, and the constitutionality of the White Slave Act was questioned. The Supreme Court said: "The prohibition is not in terms confined to transportation by common carrier, nor need such a limitation be implied in order to sustain the constitutionality of the enactment." The indictment in that case was also drawn under the provisions of Sec. 2 of the White Slave Act. There is nothing in the opinion which shows that in construing the Act the *whole* of the Act, nor any of the other sections thereof, was considered in arriving at the decision. That, however, is of no importance at this stage of the argument, but will be adverted to a little later herein. The point we desire to make here is, that the language of the court above quoted must be read and interpreted with reference to the fact that an "electric railroad," if engaged in transporting passengers for hire, *is* a *common carrier,* as that term is commonly and broadly applied to all such means of transportation, although that particular road had been held not to be a "common carrier" within the terms of the *Interstate Commerce Act.* The transportation of the woman in the Wilson case was, in fact, over the line of a *common carrier,* and the Supreme Court undoubtedly so viewed it. The language, therefore, that "The prohibition is not in terms confined to transportation by common carrier," was not necessary to the decision, and should be regarded as *dictum.* Had the act of transportation in that case been by private automobile, as here, we apprehend that the court would have

held it not within the terms or intent of the Act, particularly if Sec. 2 of the Act were construed with reference to the other sections, to wit, 3, 4, and 5.

The interpretation of legislative acts is governed by certain well established rules, among which are the following:

A legislative act is to be interpreted according to the intention of the legislature apparent upon its face.

U. S. vs. Fisher, 109 U. S. 145;
U. S. vs. Goldenberg, 168 U. S. 102.

There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after one sees the results of experience.

Justice Story, in Platt vs. U. P. R. R. Co., 99 U. S. 63.

The true rule is that statutes are to be construed as they were intended to be understood when they were passed.

Schuyler vs. Thomas, 98 U. S. 172,

wherein Justice Hunt said: "The after wisdom, obtained by unfortunate results, can not be applied in their interpretation."

Platt vs. U. S., *supra;*
U. S. vs. U. P. R. Co., 91 U. S. 81;
Wash. Market Co. vs. Hoffman, 101 U. S. 119.

While a court in construing a penal statute is not

required to shut its eyes to notorious mischiefs which it was intended to suppress, (Holy Trinity Church vs. U. S., 143 U. S. 163, U. S. vs. Sullivan, 43 Fed. 604, U. S. vs. Mattock, 2 Sawy. (U. S.) 148), care must be observed not to extend the statute to offenses not embraced within its language, merely because they involve the same mischief which the statute aimed to suppress.

U. S. vs. Chase, 135 U. S. 261;
U. S. vs. Hewecker, 79 Fed. 64.

In construing a statute recourse must be had to the context, and all its provisions must be considered together.

Mo. etc. R. Co. vs. Haber, 169 U. S. 635;
U. S. vs. Burr, 159 U. S. 84;
U. S. vs. Moore, 95 U. S. 762;
U. S. vs. Boisdore, 8 How. 121;
U. S. vs. Fischer, 2 Cranch. (U.S.) 386:
Strong vs. U. S., 93 Fed. 260;
U. S. vs. Morton, (C.C.A.) 65 Fed. 210.

That a law is the best expositor of itself; that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations *restricting the extent of general expressions* used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged. (Italics ours.)

Chief Justice Marshall in Pennington vs. Coxe, 2 Cranch 52.

The various provisions of an act should be read so that all may, if possible, have their due and *conjoint* effect without *repugnancy* or *inconsistency.* (Italics ours.)

New Lamp etc. Co. vs. Ansonia Brass etc. Co., 91 U. S. 662;
Patterson vs. Winn, 11 Wheat. (U.S.) 389;
U. S. vs. Newhall, 91 Fed. 529;
U. S. vs. Hammond, (C.C.A.) 104 Fed. 864;
In *re* Yertwillig, (C.C.A.) 92 Fed. 339;
U. S. vs. Landram, 118 U. S. 85.

But where absolute harmony between parts of a statute is demonstrably non-existent, the court *must reject* that one which is least in accord with the general plan of the whole (In *re* Hammond, 98 Fed. 845) or if there be no ground for choice between inharmonious sections, *the later section* being the *last expression* of the legislative mind must, in construction, vacate the former to the *extent* of the *repugnancy.* (Italics ours.)

In *re* Richards (C.C.A.) 96 Fed. 935;
In *re* Tune, 115 Fed. 911.

In construing a criminal statute containing more than one section, the Supreme Court, in the case of U. S. vs. Burr, 159 U. S. 84, said: "In arriving at the true intention of Congress, we *can not treat Sec. 1 as if it constituted the entire act, but must deduce*

the intention from a view of the whole statute and from the material parts thereof." (Italics ours.)

In the case of Holy Trinity Church vs. U. S., 143 U. S. 463, the Supreme Court said: "Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this, the court looks at contemporaneous events, the *situation as it existed and as it was pressed upon the attention of the legislative body.* (Italics ours.) And in the U. S. vs. U. P. R. T. Co., 91 U. S. 79, the court said: "The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing such statute, may with propriety *recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason, as well as the meaning, of particular provisions of it.*" (Italics ours.) And on this same point it was said in Preston vs. Broader, 1 Wheat. 121: "It is frequently necessary (in the construction of statutes) to *recur to the history and situation* of the country in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable a court to apply with propriety the different rules for construing statutes. (Italics ours.)

In view of these rules of construction, it is necessary here to take into view the provisions of the other sections of the White Slave Traffic Act, and the conditions existing at the time of its passage in 1910, in order to ascertain whether Congress intended to include transportation by means other than "common carriers," or, in other words, whether transportation by a private automobile is embraced within the prohibition of the statute.

Sec. 3 of the Act reads as follows: "That any person who shall knowingly persuade, induce, entice or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in *interstate or foreign commerce,* or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and be *carried or transported as a passenger upon the line or route* of any *common carrier* or *carriers in interstate* or *foreign commerce,* or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished" etc. (Italics ours.) (36 St. L. 825.)

Sec. 4 of said Act is as follows: "That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly *induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers,* shall be deemed guilty of a felony,

and on conviction thereof shall be punished by a fine of not more than *ten thousand dollars*, or by imprisonment for a term not exceeding *ten years, or by both such fine and imprisonment," etc.* (Italics ours.) (36 St. L. 826.)

Sec. 5 (Jurisdiction of courts) reads as follows: "That any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or *from, through, or into which any such woman or girl may be carried or transported as a passenger in interstate or foreign commerce,* or in any Territory or the District of Columbia, contrary to the provisions of any of said sections." (Italics ours.) (36 St. L. 826.)

Now, it will be observed that under sections 3 and 4 of the Act a conviction can not be had unless it be alleged and proven that the woman or girl was *carried or transported* as a *passenger* upon the *line or route of a common carrier or carriers in interstate or foreign commerce, or in any Territory or the District of Columbia.* And yet the acts or crimes denounced in said sections are far more reprehensible than the simple act of transportation, etc., of a woman or girl as denounced in Sec. 2 of the Act. Indeed, the crime denounced in Sec. 4 is considered so much more reprehensible, as it should be, that the punishment is just *double* that provided in Sec. 2. Can it be reasonably or in common sense said that Congress intended to make the *greater* crime easier to commit with impunity by limiting the transportation or carrying of the girl to that of a *common carrier,* and did not intend to so limit the lesser

crime? If such an interpretation is to be placed upon the Act, then a person can commit the acts denounced in sections 3 and 4 by the simple expedient of causing the transportation of a most innocent girl by means of a private conveyance of any kind and escape punishment under the Act (which is true, as must be conceded), while the person who transports or aids or assists in transporting a woman or girl (be she ever so willing, and be she even the worst kind of a prostitute) by means of any conveyance, whether a common carrier or not, must be subject to prosecution and punishment. It seems to us absurd to say that Congress, in view of these considerations, intended any such effect of the Act. On the contrary it must have been intended to limit the transportation in all cases to that by common carrier; otherwise, such limitation would not have been placed in some of the sections and not in the other. The true rule here would be to make Sec. 2 harmonize with the other sections in order to put a reasonable and effective construction upon the entire Act. As was said In *re* Richards, *supra,* "If there be no ground for choice between inharmonious sections, the *later section* being the last expression of the legislative mind *must,* in construction, vacate the *former* to the *extent* of the *repugnancy.*" And in U. S. vs. Burr, *supra,* "In arriving at the true intention of Congress, *we can not treat Sec. 1 as if it constituted the entire act, but must deduce the intention from a view of the whole statute and from the material parts thereof.*" (Italics ours.)

Again: Sec. 5, conferring jurisdiction on the

courts under the Act, provides that "any violation of any of the above sections two, three, and four shall be prosecuted in any court having jurisdiction of crimes within the district in which said violation was committed, or *from, through,* or *into* which any such woman or girl may have been *carried or transported* as a *passenger* in *interstate or foreign commerce.*"

The term "passenger" has a definite legal meaning, and has been defined by the courts.

The word "passenger" means one who travels in some *public conveyance* by virtue of a contract, express or implied, with a carrier on the payment of fare or that which is accepted as an equivalent therefor. (Italics ours.)

> Birmingham Ry. etc. vs. Adams, 146 Ala. 267, 119 Am. St. Rep. 27.

The term "passenger" is said to include all persons who pay freight for their persons, apart from merchandise.

> The Main vs. Williams, 14 Sup. Ct. 486, 152 U. S. 122, 38 L. Ed. 381.

The Standard dictionary defines "passenger" as "A person who travels in a public conveyance, as a railway car or a steamship; one carreid for fare by a common carrier."

Sec. 5 therefore must be read in connection with Sections 2, 3, and 4, to determine whether Congress intended that the act of transportation, in order to give the courts jurisdiction, must take place over "the line or lines of a common carrier, etc." As

there is nothing in the Act to indicate that Congress used the term "passenger" in Sec. 5 in any other sense than as one carried in a public conveyance, that is, by a common carrier, it must be held that the word was used with its common, ordinary meaning, and that a woman or girl carried or transported by private conveyance would not be within the terms of the Act. And in that behalf, attention is here called to the allegation in each count of the indictment, to wit, that the defendant did transport, etc., "from Reno, in the State of Nevada, to Sloat, in the State of California, *through* the said Northern Division of the said Northern District of California," in order, we must assume, to bring the accusation within the terms of said Sec. 5 that the court might have jurisdiction.

We now contend, and make the point here, that because the indictment does not allege or show that the transportation was by means of a common carrier in interstate commerce, the court had no jurisdiction to try the defendant.

A very interesting decision involving the construction of a similar statute is that of

U. S. vs. Sheldon, 2 Wheat. (U. S.) 119,

wherein the Supreme Court construed the provisions of an act which made it a misdemeanor for any one to "*transport,* or attempt to transport, overland or otherwise, in any wagon, cart, sleigh, boat *or otherwise,* naval etc. stores etc. from the United States to Canada, etc." The defendant was charged with a violation of the act by driving, on foot, living oxen, cows, steers, etc., from the United States into Can-

ada. The court held that such act did not come within the inhibition of the statute.

Now, to recur to the history of the time at which the Act was passed, and the conditions then existing. In 1910 when the Act was passed, automobiles were only just beginning to come into general use, and that only for limited distances, their use then being confined generally to cities and their suburbs. Today, of course, they are in general use for long distance travel, almost to the exclusion of all other means of travel on land except railroads. Many of them have now become "common carriers," competing with railroads. That condition did not exist at the time the White Slave Traffic Act was passed, and it is only reasonable to suppose that Congress did not contemplate nor have in view the possible expansion of the automobile industry nor the improvements which have since been made in them and which have of late years brought them into almost universal use for travel by land. In the year 1909, there were but 114,891 automobiles and motor vehicles of all kinds produced in the United States; at the end of 1910, six months after the passage of the White Slave Act, the number had increased to 200,000; Encyc. Brit., Vol. XVIII, p. 920. In 1916, or six years after the passage of the Act, the number had increased to 1,200,000; Encyc. Americana, Vol. 2, p. 643.

We submit that the demurrer should have been sustained, and that the trial court erred in overruling said demurrer.

Spec. 2. The trial court erred in asking the question of R. S. Briscoe, a witness for the defendant,

to wit: "A small reputation or a small place?" and in failing to properly instruct the jury to wholly disregard the same. (Spec. 2; Ass. of Er. XIX and XX; Exception No. 16, Tr. p. 232.)

It will be observed that the court was cross-examining the witness upon the question of the defendant's reputation. The question itself would seem to indicate that the court was trying to belittle the witness' testimony, and tended to show bias and prejudice agains the defendant, and its effect upon the jury was prejudicial to the defendant. The striking out of the "question" and the "withdrawal of the remark" by the court, with the statement that the court misunderstood the witness, was insufficient to remove from the minds of the jury the unfavorable impression occasioned by the remark. The jury, in order to remove such unfavorable impression as far as possible, should have been specifically instructed at that time to wholly disregard the same, with such other instructions as would most naturally tend to remove from their minds any prejudice against the defendant which might have been occasioned by the remark. We contend that it was prejudicial and reversible error.

While it is the duty of the trial judge in a criminal prosecution in the Federal court, to facilitate the orderly progress of the trial, and to shorten unimportant preliminaries, and discourage dilatory tactics of counsel, it is improper for the judge to take part in the cross-examination of defendant's witnesses in such a manner as to impress the jury with

the idea that the judge had a fixed opinion that accused was guilty and should be convicted.

Adler vs. U. S., 182 Fed. 464;
Starr vs. U. S., 153 U. S. 614.

Spec. 3. The question here involved was the legitimacy of the youngest child of C. A. Northcutt and Mrs. Northcutt. Northcutt had testified in chief that he was the husband of Mrs. Myrna Northcutt, and that he had *two* children. (Tr. p. 78.) Mrs. Northcutt testified that she was the wife of C. A. Northcutt; that they were married April 12, 1911; that they had *three* children; that the youngest was born April 6, 1918; that the last time she and her husband had resided and cohabited together was for about three weeks immediately prior to July 28th, 1917, and they had the ordinary matrimonial relations during that period. (Tr. pp. 307-308.) There was no contradiction of said Mrs. Northcutt's said testimony. It will be observed that Northcutt's testimony, given as the first witness at the trial, was not an affirmative declaration that the youngest child was not his, but later when it did appear that there were three children, the only inference that could be drawn from his said testimony was that he denied that he was the father of said child; and it was made to appear positively later when, in the cross-examination of Mrs. Northcutt, the prosecuting attorney demanded that the "baby" be brought into court for the purpose of exhibition to the jury, the objection of counsel for the defendant, the motion of defendant to strike out all evidence relating thereto, and the coloquy

that thereupon took place among the court and respective counsel. (Tr. pp. 374-376.) The court sustained the objection, but not upon the ground of objection, (Tr. pp. 374-376) and positively stating in the presence of the jury that the rule which precludes a parent's denying the legitimacy of a child born under said circumstances does not apply in cases of this kind, and denied the motion to strike out upon that ground and upon the further ground that no objection had been made to the testimony. As to the latter ground, we submit that no objection could have been properly made at the time Northcutt testified having only two children. A general instruction was offered at the close of the case, upon the subject, which the court refused to give, (Ass. of Er. LXXXII), and to which the defendant duly excepted. (Tr. pp. 430 and 436.)

The rule that a child born in lawful wedlock is presumed to be legitimate is one of the strongest presumptions in the law and can not be overcome by testimony of either the husband or the wife.

Peo. vs. Case (Mich.), 137 N. W. 55.

The rule applies in criminal cases as well as in civil cases.

Chamberlain vs. Peo., 23 N. Y. 85, 80 Am. Dec. 255.

See also

Patterson vs. Gaines, 6 How. (U. S.) 550;

Dennison vs. Page, 29 Pa. St. 420, 2 L. R. A. (N. S.) 620, note.

Spec. 4. The overruling by the court of defendant's objection to the argument of the prosecuting attorney set out in this specification and in approving said argument and failing to instruct the jury to disregard the same was prejudicial error. (Spec. 4; Ass. of Er. LVI; Tr. p. 407.)

It is improper for the prosecuting attorney to argue upon matters outside the issues in the case and which would not be relevant if offered in evidence.

16 C. J. 899, and cases there cited.

This line of argument tended to confuse in the minds of the jury the real issue. It was not based upon the evidence, or the issue, but was intended to influence the jury and prejudice them against the defendant to the end that a verdict might be obtained against the defendant. We contend that it was prejudicial error.

Spec. 5 and 6. These two specifications cover like errors, and will be argued together. (Spec. Nos. 5 and 6; Ass. of Er. LIX and LX; Tr. p. 410.)

The statement of the prosecuting attorney, "except one that the law forbids me to mention about, gentlemen of the jury," lines 12, 13, and 14, Tr. p. 410, referred of course, to the fact that the defendant did not testify in the case. This is made plainer in the remarks of the prosecuting attorney set out in Specification 6 herein (Tr. p. 410, lines 23 to 31). A reading of these remarks can not fail to disclose that the prosecuting attorney referred directly to the fact that the defendant did not testify, and the jury

could not have understood otherwise. The woman in the case, Mrs. Northcutt, had testified fully and had denied positively that there had been any immoral relations between the defendant and her. (Tr. pp. 307-401; see p. 338, lines 28 to 30.) The defendant did not testify.

It is reversible error for the prosecuting attorney to call the attention of the jury in any way to the defendant's right to testify on his own behalf.

McKnight vs. U. S., 115 Fed. (C. C. A.) 972.

It was also held in that case that the error was not cured by the fact that the defendant actually testified afterward.

Under statutes providing that the accused's failure to testify shall not create any presumption aganist him, it is improper and erroneous for the prosecuting attorney to comment upon, or to make any reference in his argument to, accused's neglect or failure to take the stand and testify, *either directly or so pertinently as to direct the jury's attention to such fact, and it is the duty of the court to see that such impropriety is not committed.* (Italics ours.)

16 C. J. 901, citing, among other cases, the case of Wilson vs. U. S., 149 U. S. 60, 37 L. Ed. 650.

Spec. 7 to 11, inc. These specifications all relate to and cover errors of the same general character in the giving of instructions and will be argued together. (Spec. 7 to 11, inc.; Ass. or Er. LXI to LXV, inc.; Tr. pp. 412-417.)

The court will observe that the indictment herein,

as hereinbefore pointed out, and each count thereof. is drawn under the provisions of Sec. 2 of the White Slave Traffic Act. It charges the defendant only with "transporting, and aiding and assisting in transporting" Mrs. Northcutt for the various immoral purposes alleged in the different counts. The defendant is *not* charged with *persuading, inducing,* or *enticing* the woman *to be transported,* which is the subject of denunciation in Sections 3 and 4 of the Act, nor was he being tried for such. Yet the court specifically instructed the jury in that behalf, designating it as the *third phase* of the Act. The portions of the said instructions involving that error are italicized in the Specifications herein (Except Spec. 9), and in the Assignment of Errors they are underscored (except Ass. No. LXIII) for the purpose of italicizing had the transcript been printed, as it was thought it might be when the Assignments of Error were drawn. (Ass. of Er., Tr. pp. 44-47.) These and other instructions were duly excepted to by counsel for the defendant, (Tr. pp. 437-438).

Such instructions were erroneously given because they involved or applied law not applicable to the case, and could only tend to confuse the issue in the minds of the jury, particularly after a long trial wherein the prosecution was permitted to cover a very wide range of testimony and introduce scores of telegrams, letters and other documents without direction by the court as to what, if any, portions thereof were applicable to the issue involved.

The portions of the said instructions complained of are as follows: That act, (White Slave Traffic Act)

so far as here involved, provides, in substance, that any person who shall * * * persuade, induce or entice, any such woman or girl to be so transported in interstate commerce for any such immoral purpose; is guilty of a public offense (Ass. of Er. LXI). * * * The statute, as you will note, is very comprehensive on the subject of which it treats, and covers several distinct and different acts, each one of which is made a criminal offense under its provisions; * * * and, third, the persuading, inducing or enticing any such woman or girl to be so transported in interstate commerce for such immoral purpose. All of these different acts constitute separate offenses under the statute. * * * under the third phase of the statute it is an offense to persuade, induce or entice such woman or girl to be so carried or transported for such immoral purpose whether the act of immorality is to be committed with the person so persuading, inducing or enticing her or with another or others. (Ass. of Er. LXII.) * * * As to the third phase of the act referred to, that of persuading, inducing or enticing, it is not essential to guilt under these terms that any particular method shall be employed. The terms persuade, induce and entice are used in the statute in their ordinary, popular sense, and imply the arts of entreaty, protestations of affection, allurement, promise of marriage, or similar means to influence the mind or inclination of the woman and induce her to consent to be transported for such immoral purpose. (Ass. of Er. LXIII.) * * * The indictment in this case is framed in five separate counts, which you will find to cover and in-

clude the several acts denounced in the statute "as I have outlined them above." (Ass. of Er. LXIV.) * * * These different counts are intended to meet the different phases of the act "which I have defined to you" * * * under the different phases of this act, the only difference between the counts being the specific intent alleged. (You will observe that each one of these counts) covers an act committed, * * * and so it is permitted to be charged in the various forms which are justified by the statute. (Ass. of Er. LXV.)

While the above language covers the portions of the instructions complained of and specified, yet it is necessary to read the whole of the instructions in which such language is found in order to see clearly what effect the portions excepted to may and could have had upon the jury. And to show more clearly the confusion, which apparently existed in the mind of the court relative to just what the charge was in the indictment, and which, of course, must have been communicated to the minds of the jurors, note the following language in that portion of the instruction set out in Ass. of Er. LXII, Spec. 8, to wit: "Under the first it is an offense to transport or aid or assist in the transportation of such female for the purpose denounced, whether she goes of her own volition, that is, willingly, *or is induced to go by the means stated in the statute* * * * under the second it is an offense to procure or aid in the procuring of the means of transportation of such woman, whereby she is transported or carried for such unlawful purpose, and this whether she goes willingly *or is in-*

duced by some one of the means mentioned in the statute to undergo such transportation * * * "

The quoted language in italics refers, of course, to the provisions of the so-called third phase of the act, that is, the persuading, inducing, enticing, or coercing the transportation denounced in Secs. 3 and 4 of the act.

Upon an examination of the instructions given by the trial judge in the Diggs-Camannetti cases, who also tried this case, it will be found that the instructions there given on the same subject were almost identically the same as here given; but in that case the defendants were indicted under both Sections 2 and 3 of the Act. The conclusion seems to be justified that the trial judge confused the allegations of the indictment in that case with the indictment in this case, and gave the same instructions in each case. If the trial judge was so confused, it is only reasonable to assume that the jury in this case was confused by the instructions.

In reading the statute, it is error for the court to read that portion thereof *which does not define* the *crime charged, but defines another and distinct crime.*

Jones vs. State, 22 Tex. App. 680, 3 S. W. 478, *unless* he *expressly limits* the application of the statute to the *charge in the indictment.* (Italics ours.)

Simons vs. State, (Tex. Cr. App., 1896), 34 S. W. 619;

Hargrave vs. State (Tex. Cr. App., 1895), 30 S. W. 444.

See also

Lee vs. State, 16 Ariz. 291, 145 Pac. 244;
Dow, *et al.* vs. U. S. (C. C. A.), 82 Fed. 904.

As a general rule it is the duty of the trial court to instruct the jury distinctly and *precisely* upon the law of the case. (Italics ours.)

16 C. J. 962, and cases cited.

In the case at bar it will be observed that the court not only instructed as to the provisions of the Act not applicable, to wit, the so-called *third phase,* but specifically instructed also that the indictment covered and included the several acts denounced in the statute as outlined by the court. The following is the language referred to: "The indictment in this case is framed to cover and include the several acts denounced in the statute as I have outlined them above * * * " (Spec. 10; Ass. of Er. LXIV); and "These different counts are intended to meet the different phases of the act which I have defined to you * * * " (Spec. 11; Ass. of Er. LXV.) Thus the error was repeatedly emphasized, and could not fail to impress the jury and confuse them. That it was reversible error we think there can be no question.

Spec. 12. It was error to give this instruction in the language given, because it assumed that the evidence showed that immoral relations had existed between the defendant and Mrs. Northcutt after the alleged transportation from Reno to Sloat, if not before. While the instruction is probably correct as an abstract principle of law, and, of course, would be

if the evidence in the case showed that there had been immoral sexual relations between the parties, either before or after the alleged transportation, and particularly in this case after the alleged transportation, yet, upon a reading of the whole instruction it must be conceded that the jury understood therefrom that there was no question in the mind of the court that such immoral relations did exist after such alleged transportation; while as a matter of fact there was no direct evidence of any such relations; it was all circumstantial, to say the least, and the question should have been left entirely to the determination of the jury.

Spec. 13. It was reversible error for the court to give this instruction on the presumption of innocence as it was modified by the court by the inclusion of the words *in its charity.* (Ass. of Er. LXVIII; See Inst., Tr. p. 421, lines 9 to 12, inc.; Exc., Tr. p. 438, lines 11 to 13 inc.) In Spec. 15, Ass. of Er. LXXII, Exc. Tr. pp. 350-351, will be found a correct instruction on this subject offered by the defendant and which the court refused. The instruction as given deprives the defendant of his constitutional right in that behalf. It belittles the principle of law involved therein, and must have impressed the jury with the idea that it was a mere form of expression which did not bind them in any way. We can find no authority for thus emasculating this most important instruction.

The accused is entitled to, and it is error to refuse on request, a proper instruction on the presumption of his innocence which goes with him throughout the

trial, or until it is met and overcome by the evidence in the case.

16 C. J. 983, and cases there cited in support of the text.

The instruction offered by the defendant (Offered Inst. No. 4, Tr. p. 433) was the proper instruction to be given and to which the defendant was entitled; and the one given by the court in lieu thereof, to wit: "The law, *in its charity,* presumes the innocence of a defendant, and that presumption abides with him throughout the trial, and until his guilt is established by the evidence," (Tr. p. 421.) deprives the principle of its force and effect by the inclusion of the words "in its charity" and could not help creating in the minds of the jury the impression that they were not bound to give the defendant the benefit of that presumption. We most respectfully insist that this is reversible error.

Spec. 14. Defendant's offered instruction set out in this specification should have been given. (Spec. 14; Ass. of Er. LXXI; Offered Inst. No. 2; Tr. p. 432.) The court's instruction defining these terms, "concubine," "mistress," and "debauchery," was not applicable to this case and were inaccurate. The statement that to constitute the relation of "concubine," and "mistress" it is not necessary that such cohabitation or living together shall continue during any fixed or definite period of time (Tr. p. 417) is inaccurate in this: That it assumes that such relationship might be established by proof of only one act of sexual intercourse (though there was no evidence of

even that fact). The court's definition of the term "debauchery" is a strained construction or definition of the term. Defendant's offered definition: "Debauchery means that the woman is to be subjected repeatedly to unlawful sexual intercourse or fornication or adultery," is the correct definition of the term, as it is used in this statute, and these definitions have been approved in a similar case before this court.

Suslak vs. U. S., (C. C. A.) 213 Fed. 913.

The court did not define the term "cohabit" at all, and this should have been done by the giving of the offered instruction defining said term. Mere association, expressions of love and affection, and the like, could not constitute debauchery, concubinage, cohabitation.

Spec. 15. This specification was argued under our Specification 13, *supra.*

Spec. 16 and 17. The instructions requested by defendant as embodied in these two specifications should have been given. The uncontradicted testimony of Mrs. Northcutt, Tr. pp. 307-400, as corroborated by defendant's witness Joe Walker, Tr. p. 273, shows that she had a home there at Sloat as a large stockholder in the mining property, and was taking an active interest in the operations of the mine, and was elected a director. The defendant was entitled to those instructions, and the withholding of them deprived him of a substantial right.

Spec. 18. This specification has been argued, with citations of authorities, in connection with Specification 3, *supra,* to wit, relative to the question

of the legitimacy of Mrs. Northcutt's youngest child.

Spec. 19. That the court abused its discretion in denying defendant's motion for a new trial is, we think, sufficiently shown by argument and citation of authorities under each of the preceding specifications. The errors complained of are plain, and although no motion for a directed verdict was made, the court is authorized to review the evidence in such cases.

> Wiborg vs. U. S., 163 U. S. 632, 41 L. Ed. 289;
> Clyatt vs. U. S., 197 U. S. 207, 49 L. Ed. 726.

The testimony of Mrs. Northcutt, Tr. p. 316, and the admission of the prosecution, Tr. p. 317, show that the automobile in which the alleged transportation from Reno to Sloat took place, was Mrs. Northcutt's private car. She was simply driven by the defendant in her own private automobile to her then place of residence at Sloat, and there was no element of "commerce," interstate or otherwise, in the transaction. No fare was paid by either the defendant or Mrs. Northcutt. She was not a "passenger" nor was she "carried or transported as a passenger" in interstate commerce, as required by Sec. 5 of the White Slave Traffic, in order to give the court jurisdiction to try the defendant.

It is respectfully submitted that the judgment should be reversed.

FRANK A. DURYEA,
Attorney for Plaintiff in Error.

No. 3540

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM E. GOWLING,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR

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F. D. MONCKTON,

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REPLY BRIFF

STATEMENT OF FACTS.

The plaintiff in error, hereinafter called the defendant, was convicted on the 25th day of May, 1919, in the District Court for the Northern District of California, of violating the Act of June 25, 1910, commonly called the "White Slave Traffic Act," in transporting for immoral purposes a woman, by means of an automobile, from Reno, in the State of Nevada, to Sloat, in the State of California.

The defendant was indicted and convicted upon five counts under Section 2 of the Act. The only difference between the various counts was the purpose for which the defendant transported the woman.

The defendant contends that the indictment under which he was convicted did not state an offense under the provisions of the Act of June 25, 1910, in that it is not charged that the transportation was in interstate commerce within the meaning and intent of the Act nor that it was by means of a common carrier. The other contentions of the defendant have to do with the instructions of the court and the ruling of the court upon the admissibility of evidence and the argument of counsel for the prosecution.

ARGUMENT.

I.

Interstate commerce, among other things, includes the passage of persons or property from one state to another, and it is not necessary in order to sustain an indictment under Section 2 of the Act of June 25, 1910, that the Government either allege or prove that the vehicle or means of transportation was a common carrier.

United States vs. Burch, 226 Fed. 974.
United States vs. Rider, 226 Fed. 974.

> "And the transportation of persons has long been held to be commerce. Interstate commerce then is, among other things, the passage of persons or property from one state to another. It

does not necessarily, or indeed at all, involve the idea of a common carrier, or the payment of freight or fare. Interstate commerce being, therefore, in so far as applicable here, the passage of persons from one state to another, the declaration of the act, 'that any person who shall transport any woman in interstate commerce,' is equivalent to the declaration 'that any person who shall transport any woman from one state to another.' It was any transportation from state to state, for the purposes mentioned, that Congress intended to prohibit, and did prohibit, and not such transportation by common carrier alone. In these days it is just as easy to transport a woman or girl by automobile as by rail, and the former method may in many cases be much more expeditious and clandestine than the latter. It is true that the courts will not extend the language of an act so as to embrace cases that do not come within its terms; but, on the other hand, they are not authorized to limit the application of the words used, so as to exclude cases that fall within their ordinary meaning, and are fully within the evil which the act was intended to cure."

Wilson vs. United States, 232 U. S. 563, 58 L. Ed. 728.

"But, in our opinion, in order to constitute an offense under the act it is not essential that the transportation be by common carrier. The statute reads: 'That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce,

* * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, * * * or who shall knowingly procure or obtain, or cause to be produced or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, * * * in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, * * * whereby any such woman or girl shall be transported in interstate or foreign commerce, * * * shall be deemed guilty of a felony,' etc.

"The prohibition is not in terms confined to transportation by common carrier, nor need such a limitation be implied in order to sustain the constitutionality of the enactment. As has already been decided, it has the quality of a police regulation, although enacted in the exercise of the power to regulate interstate commerce (*Hoke vs. United States,* 227 U. S. 308, 323; *Gloucester Ferry Co. vs. Pennsylvania,* 114 U. S. 196, 215); and since this power is complete in itself, it was discretionary with Congress whether the prohibition should be extended to transportation by others than common carriers."

Also: Bouviers Law Dictionary, page 531.

The indictment in the case at bar charges the defendant with transporting the woman in "interstate commerce." Section 1 of the Act of June 25, 1910, itself defines the term "interstate commerce" as

including any transportation from one state to another.

> "That the term 'interstate commerce,' as used in this act, shall include transportation from any state or territory or the District of Columbia to any other state or territory or the District of Columbia."
>
> Act of June 25, 1910.

The language used in Section 2 of the Act of June 25, 1910, is plain and admits of no more than one meaning, and no limitation can be implied because the duty of interpretation does not arise.

> *Caminetti vs. United States,* 242 U. S. 443, 61 L. Ed. 470.
>
> "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Hamilton s. Rathbone,* 175 U. S. 414, 421; 44 L. Ed. 219, 222; 20 Sup. Ct. Rep. 155. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc. in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for 'any other immoral purpose,' or with the intent and purpose to induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice."

The defendant in the Caminetti case was charged and convicted under Section 2 of the Act of June 25,

1910, and the court was discussing the language of the indictment under that section in its opinion.

II.

There is nothing in the argument of the prosecuting attorney that was improper or calculated to prejudice the jury against the defendant.

1. The language assigned as prejudicial in specification No. 4 is the following:

> "Now, gentlemen of the jury, can you, as twelve honorable men, chosen by reason of that very fact, say that William E. Gowling, this defendant, *is innocent of the charge your government has brought against him; is innocent of sneaking into the home of his friend and relative* and there destroying the very ties that bind the husband and wife together; is innocent of taking advantage of the trust and confidence of Carleton Northcutt, who left his home and friends and relatives and all that there was—"

This language is merely the attorney's construction of the facts presented to the jury, and the following remarks of the court so indicate.

> "I think that is perfectly legitimate. An argument by counsel is based upon their theory of what the evidence shows. Now, in presenting their argument to the jury they are confined to certain limitations; they may argue things in accordance with their construction, and it is for the jury to determine whether the evidence bears it out; the point which counsel is making is entirely within the proprieties."

There was in fact no exception reserved by the defendant as to the use of this language.

2. The language assigned as prejudicial in specification No. 5 is as follows:

> *"And that is one of the cleverest things he did during the whole trial, except one which the law forbids me to mention, gentlemen of the jury."*

No sufficient exception was reserved to the ruling of the court on this language. Trans. 410.

This remark could in no way affect the rights of the defendant. The judge who tried the case could not understand the basis of the defendant's objection at the time it was made, and even counsel for the defendant admitted at that time that he did not know what was meant. We submit that a remark that is so subtle that neither the court nor counsel for the defendant could appreciate it can hardly prejudice the rights of the defendant before a jury of laymen. The following discussion at the time of the objection will illustrate this fact:

> Trans. 410. "Mr. Court: What remark? Mr. Duryea: Referring to matter he was forbidden to mention before the jury. The Court: What does he refer to? Mr. Duryea: I do not know, but I think it is a remark that is detrimental to the defendant in this case. The Court: You must explain it yourself so that I can understand you. Mr. Duryea: If counsel knows of something he does not dare refer to— The

Court: I do not understand your reasoning myself. Mr. Duryea: I do not know what he means myself."

3. The language assigned as prejudicial in specification No. 6 is as follows:

> "Now, it was stated by Mr. Duryea that there was someone here that was willing to drag this little woman through the mire of this action and brand her as a white slave, and I want to tell you that there is somebody here that is willing to do that, and that somebody is Frank Duryea and the defendant here, because she was brought here so that the defendant could hide behind her skirts, and put on that witness stand, *and she was left alone to bear the brunt of this whole proposition on that witness stand alone.*" (Ass. or Er. LX; Tr. pp. 410 to 411.)

No sufficient exception was reserved to the ruling of the court upon this matter and if there was anything prejudicial to the defendant, the instruction to the jury made by the court at the time of the objection cured it. The following quotation from the Bill of Exceptions shows that the jury was properly admonished against any possible prejudice that might arise because of the remark of counsel:

> "The Court: Well, I cannot do other than to recognize your exception. He has a reasonable limit of comment. What is the objection? Mr. Duryea: The statement that the defendant left her to bear the burden alone. The Court: If you will suggest what it refers to I will be able to rule on it. Of course, as I said this morning,

counsel are permitted to comment on the course of the trial and the character of the witnesses and the deductions to be drawn from them and matters of that kind. Now, the witness, Mrs. Northcutt, was put upon the stand in behalf of the defendant. Mr. Duryea: Certainly. The Court: Well, what is the subject of your criticism? Mr. Duryea: That she was left alone to bear the burden. The Court: There were other witnesses, Mr. Johnson; you do not mean that she was left as the sole witness. Mr. Johnson: Not as the sole witness in the case, no. The Court to Jury: Of course this is argument by counsel, and the evidence is all before you and you are not to draw any unfavorable deductions from anything that counsel says that would in anywise reflect upon the defendant's case. That is all I can say to you."

III.

The court did not err in refusing to strike out all the testimony tending to deny the legitimacy of the youngest child of Mrs. Myrna P. Northcutt for the reason (1) that no objection or motion to strike was made by the defendant at the time such testimony was received. (2) Some of the testimony was brought out by the defendant from one of his own witnesses. (3) That the testimony of parents as to the legitimacy of their children is admissible where the legitimacy of their children is not directly in issue.

1. The record shows that C. A. Northcutt, a witness for the government, in his direct testimony stated that he had two children (Trans. page 78).

Subsequently the following questions were asked and answers given:

> "The Court: Did Mrs. Northcutt have a baby with her in Riverside? A. Yes, sir. The Court: You did not take that? A. No, sir. The Court: How long had you gone to France? A. I was in France a little over seventeen months; I was away from Mrs. Northcutt about twenty months. The Court: You were away from Mrs. Northcutt about twenty months; that is, you had not seen her for twenty months up to the time of your return? A. I last saw her July 20, 1917, and January 25, 1919, was the next time. The Court: How old is this baby? A. It was born April 6, 1918; that makes it a little over a year old. *Mr. Duryea: Q. When did you last see your wife before you went to France? A. July* 20, 1917. *Q. And you had been with her about two weeks in New York up to that time? A. Approximately.*"

It will be noted that all of the evidence was brought out without objection or exception and that the last question by the representative of the defendant upon his behalf. At this point in the case it did not clearly appear that Mrs. Myrna P. Northcutt and C. A. Northcutt had more than two children as testified to by her husband when he first took the stand. The only testimony that would seem to show that they had more than two children was the following testimony by C. A. Northcutt:

> "Court: Did Mrs. Northcutt meet you at San Bernardino? A. Yes, sir, with the three children" (Trans. page 183).

It was not until Mrs. Myrna P. Northcutt, a witness called by the defendant, testified upon her direct examination that she and her husband had three children that any real doubt as to the legitimacy of the last child was raised. The following testimony was brought out on direct examination of Mrs. Myrna P. Northcutt upon behalf of the defendant:

> "I am the wife of Carlton A. Northcutt, the gentleman sitting there. We were married April 12, 1911. We have three children of that marriage. They are Laolyn Pattison Northcutt, born April 1, 1912; Lois Northcutt, she will be four years old the 10th of this coming May; and Carlton Andrew Northcutt, Jr., 1 year old on the 6th of April of this year. I last resided with my husband in New York several weeks prior and up to and including July 28, 1917, at the Great Northern Hotel. It was possibly three weeks before he sailed. I occupied the same room and same bed with him during that period and had the ordinary matrimonial or family relations with him during that period."

No objection or motion to strike out any of this testimony was made until the prosecuting attorney asked that the youngest child be brought into court as an exhibit (Trans. page 374). The objection to the presentation of the child was sustained by the court (Trans. page 376). Counsel for the defendant at this time made a motion to strike out the testimony tending to deny the legitimacy of the child, and the court said in denying the motion:

"There is nothing to strike out. You cannot have a motion to strike out without an objection, counsel cannot stand by and have evidence go in without making their objection until after it has gone in" (Trans. page 376).

It does not seem reasonable to suppose that a defendant can permit evidence to come in without objection and then complain that he is injured by the same. Especially is this true when some of the evidence was brought out on his behalf.

3. Where the legitimacy of a child is not directly in issue, the parents are competent to testify to the fact of illegitimacy.

Melvin vs. Melvin, 58 N. H. 569.

"It has been held that the testimony of the husband or wife to prove nonaccess, though living together, and therefore that the offspring is spurious, is incompetent upon the ground of decency, morality, and policy. * * * The authorities which support this rule are cases in which the legitimacy of children was drawn in question. The disastrous consequences that would follow the unsettling of titles to property, and the branding of legitimate children as illegitimate, have been regarded as sufficient reasons for the rule. But the mere indecency of disclosures does not in general suffice to exclude them where the evidence is necessary for the purposes of civil or criminal justice. * * * The rule does not mean that testimony of nonaccess is so obscene that it is against decency that it should be heard in court, and therefore is excluded, but the reason of it is that it is against

sound public policy and morality to allow the husband and wife to bastardize their own issue. If the evidence were excluded because of its indecency, the same reason would exclude it when offered by other witnesses, and would prevent the wife from proving her adulterous intercourse with a third person for the purpose of procuring an order of affiliation. * * * The evidence of the libellant was not within the reason of the rule."

IV.

The instructions given by the court did not apply law not applicable to the case.

The defendant contends in his specifications from No. 7 to No. 11, inclusive, that the court in its instructions erroneously applied law which was not involved in the case. The defendant did not reserve his exception upon that ground at the time the instructions were given, and we do not believe that he sufficiently excepted to any of the instructions that are alleged to be erroneous in specifications 7 to 11, inclusive. The only language that could be meant as an exception is the following:

"Mr. Duryea: And then I desire to reserve an exception, if your Honor please, to some instructions that were given. Of course, I cannot give the exact language but I think I can refer to them. The Court: Well, the subject matter of your exception is also necessary. Mr. Duryea: Your Honor's instruction with reference to the third provision of the Act, to the effect that it would be sufficient for a conviction

to show that the defendant induced or enticed or persuaded the woman to make the trip—as not being a part of the statue—"

Exceptions to a charge must state the grounds and must point out specifically the portion or portions of the charge excepted to.

Corpus Juris 107.

The instructions given by the court are substantially the same as those that were given and approved in the case of *Caminetti vs. United States,* 242 U. S. 443, which case also was brought under Section 2 of the Act of June 25, 1910.

The point the defendant tries to make is that the court in the case at bar instructed the jury upon a portion of the Act of June 25, 1910, under which he was not charged. This is not the case. The court in those portions of the instructions now objected to by the defendant as not applicable merely gave to the jury in a general way the scope of the Act of June 25, 1910, and then specifically limited the jury to a consideration of the law and the evidence as applicable to the charge in the indictment. The following quotations from the instructions will show that the court first gave the jury a general synopsis of the Act and then confined them to the law and evidence that was applicable to the charge in the indictment.

Trans. pages 412, 413, 415, 416:

"The defendant is on trial under an indictment charging him with a violation of what is

designated and commonly referred to as the White Slave Traffic Act, being an Act of Congress intended and having the purpose to suppress the transportation in interstate commerce of women or girls for immoral purposes and thus protect the commerce of the country from being subjected to such contaminating influence.

"The statute, as you will note, is very comprehensive on the subject of which it treats, and covers several distinct and different acts, each one of which is made a criminal offense under its provisions.

"In the first count of the indictment it is charged that on the 3rd ay of October, in the year 1918, the defendant unlawfully, wilfully, feloniously and knowingly did transport and cause to be transported and aid and assist in transporting in interstate commerce, that is to say, from Reno, in the State of Nevada, to Sloat, in the State of California, through the said Northern Division of the said Northern District of California, in and by means of a certain automobile running over the public highways of the United States, the owner of which said automobile was then and there in such transportation run, operated, driven and controlled by the said defendant, William E. Gowling, as aforesaid, a certain woman, to wit, Mrs. Myrna Northcutt, otherwise known as Mrs. W. E. Gowling, for a certain immoral purpose, to wit, for the purpose of debauchery.

"Now, that is the substance of the five different counts in this indictment. These different

counts are intended to meet the different phases of the act which I have defined to you and enable the jury to apply the evidence to the charge in an intelligent and discriminating manner and determine the facts as to the guilt or innocence of the defendant under the different phases of this act, the only difference between the counts being the specific intent alleged. You will observe that each one of these counts cover an act committed on the same date by the same means, between the same points, and with reference to the same woman, the only difference in each count being the form and the specific intent with which that act was committed, and that is permitted to be done, that character of indictment is permitted to be filed, because it cannot in many instances be known by the grand jury precisely what the evidence will disclose as the specific intent of the defendant, and so it is permitted to be charged in the various forms which are justified by the terms of the statute. It is not alleged that the transportation was for the purpose of prostitution and we have therefore no concern with that phase of the act."

It is respectfully submitted that the judgment should be affirmed.

FRANK M. SILVA,
United States Attorney,

WILFORD H. TULLY,
Assistant U. S. Attorney.

No. 3542

United States

Circuit Court of Appeals

For the Ninth Circuit.

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, Infants, by Their Guardian and *Prochein Ami*, HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Appellants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, Jr., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON CO., a Corporation, ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Appellees.

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

FILED
SEP 8 - 1920
F. D. MONCKTON, CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F. Cal.

No. 3542

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

No. 13,310.

CLERK'S OFFICE.

DAVID JAMES FLYNN, BARBARA FLYNN and JOHN FLYNN, Infants by Their Guardian and *Prochein Ami,* HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Libelants,

vs.

E. A. CHRISTENSEN et al.,

Respondents.

Praecipe for Transcript of Record.

To the Clerk of Said Court:

Sir: Please issue and incorporate in the apostles on appeal the following:

Amended libel.

Answer to amended libel.

All depositions and testimony taken in court.

All opinions of the court.

Decree.

Notice of appeal.

Assignment of errors.

Cost bond on appeal; and

Notice of filing cost bond on appeal.

ANDROS & HENGSTLER,

Proctors for Libelants.

[Endorsed]: Filed Jul. 20, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*Page-number appearing at foot of page of original certified Apostles on Appeal.

No. 13,310.

DAVID JAMES FLYNN, BARBARA FLYNN and JOHN FLYNN, Infants by Their Guardian and *Prochein Ami,* HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Libelants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, Jr., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAMES JOHNSON CO., a Corporation, ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Respondents.

Statement of Clerk U. S. District Court.

PARTIES.

Libelants: David James Flynn, Barbara Flynn and John Flynn, Infants, by Their Guardian and *Prochein Ami,* Honora Della Flynn, Honora Della Flynn.

Respondents: E. H. Christenson, Hans J. Lunvaldt, Charles E. Sudden, J. H. Baxter, A. Taviera, W. B. Godfred, Jr., F. M. Delano, Walter V. Rohlffs, R. L. Anderson, George F. Quigley, D. W. C. Tietjen, Cecelia F. Sudden, Henry Brooks, R. Y.

Taylor, Robert Sudden, Jas. Johnson Co., a Corporation, Albert Rowe, J. J. Staiger, Edmund Jacobs, R. C. Sudden, George Johnson, John K. Hubbard, H. Piltz, Louis Poole.

PROCTORS.

For Libelants: ANDROS & HENGSTLER, San Francisco, California.

For Respondents: NATHAN H. FRANK and IRVING H. FRANK, San Francisco, California. [2]

PROCEEDINGS:

1904.

August 12. Filed petition of Hanora Della Flynn to bring action.

Filed order permitting Hanora Della Flynn to bring action for said minors, David James Flynn, Barbara Flynn and John Flynn.

Filed verified libel for damages.

Issued citation for respondents, which was afterwards returned with the following return of the U. S. Marshal endorsed thereon:

"I have served this writ personally by copy on Charles E. Sudden and Edwin A. Christensen, partners under the name and style of Sudden & Christensen, this 17th day of August, A. D. 1904.

JOHN H. SHINE,
U. S. Marshal.
By Albert S. Dingley,
Deputy Marshal."

September 23. Filed deposition of D. W. Nilsson, taken on behalf of respondents.

November 25. Filed amended libel for damages.

1905.

May 2. Filed substitution and acceptance of Messrs. Andros & Hengstler, as proctors for libelants.

13. Filed answer to amended libel.

July 31. Filed deposition of Geo. Thomas Cainan, taken on behalf of libelants.

August 18. Filed deposition of August Ehlert, taken on behalf of libelants.

1908.

May 4. Received deposition of Chas R. Woodson, taken on behalf of libelants.

1919.

Nov. 25. Received depositions of Charles J. Baker and John W. Buckley, taken on behalf of libelant. [3]

1920.

April 12. This cause came on this day for hearing before the Honorable FRANK S. DIETRICH, Judge. After hearing the Court ordered that the case be submitted on the record, and briefs to be filed.

April 16. The Court this day filed an opinion in which it was ordered that a decree be entered in favor of libelants.

May 1. The Court this day filed an opinion in which it was ordered that a decree be entered in favor of libelant for $6,500.00, instead of amount previously awarded.

May 27. Filed decree.

July 15. Filed notice of appeal.
Filed assignment of errors.
Filed bond for costs.
Filed notice of filing bond for costs.

20. Filed praecipe for apostles.
Filed deposition of Chas. R. Woodson, taken on behalf of libelant.
Filed deposition of Chas. J. Baker and John W. Buckley, taken on behalf of libelant.
Filed reporter's transcript. [4]

District Court of the United States, in and for the Northern District of California.

DAVID JAMES FLYNN, BARBARA FLYNN and JOHN FLYNN, Infants by Their Guardian and *Prochein Ami,* HANORA DELLA FLYNN, HANORA DELLA FLYNN,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVEIRA, W. B. GODFREY, Jr., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C.

TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAMES JOHNSON CO., a Corporation, ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Amended Libel.

To the Honorable ———, the Judge of the District Court in and for the Northern District of California:

The amended libel of David James Flynn, Barbara Flynn, and John Flynn, Infants, herein appearing by their Guardian and *prochein ami* Hanora Della Flynn, Hanora Della Flynn, all of the City of San Pedro, County of Los Angeles, State of California, against E. A. Christenson, Hans J. Lunvaldt, Charles E. Sudden, J. H. Baxter, A. Taveira, W. B. Godfrey, Jr., F. M. DeLano, Walter V. Rohlffs, R. L. Anderson, Geo. F. Quigley, D. W. C. Teitjen, Cecelia F. Sudden, Henry Brooks, R. L. Taylor, Robert Sudden, Jas. Johnson Co., Albert Rowe, J. J. Staiger, Edmund Jacobs, R. C. Sudden, Geo. Johnson, John L. Hubbard, H. Piltz, Louis Poole, in a cause of action, civil and maritime, allege as follows: [5]

I.

That said defendants are and at all times herein mentioned were joint owners of the schooner "Sophie Christenson" in the proportion as follows. to wit:

E. A. Christenson 2/32; Jans J. Lunvaldt 3/32; Charles E. Sudden 3/64; J. H. Baxter 1/32; A. Taveira 1/64; W. B. Godfred, Jr., 1/32; F. M. De-

Lano 1/32; Walter V. Rohlffs 1/32; R. L. Anderson 1/32; Geo. F. Quigley 1/32; D. W. C. Teitjen 2/32; Cecelia F. Sudden 1/32; Henry Brooks 1/32; R. L. Taylor 1/32; Robert Sudden 5/32; Jas. Johnson Co. 1/32; Albert Rowe 2/32; J. J. Staiger 1/32; Edmund Jacobs 1/32; R. C. Sudden 1/32; Geo. Johnson 1/32; John L. Hubbard 1/32; H. Piltz 1/32; Louis Poole 1/32.

II.

That defendant, Jas. Johnson Co., is a corporation, incorporated under the laws of the State of California.

III.

That defendants are and at all times herein mentioned were residents of the said District.

IV.

That said Hanora Della Flynn is the widow of James Flynn, and said David James Flynn, Barbara Flynn, and John Flynn are the children of the marriage of said Hanora D. Flynn and said James Flynn, deceased; that all of said children are infants under the age of fourteen years.

V.

That said James Flynn died intestate, and said plaintiffs are the next of kin, and sole heirs of said James Flynn, deceased.

VI.

That on the 16th day of September, 1903, said Hanora Della Flynn was by an order of the Superior Court of the County of [6] Los Angeles, California, duly given and made and duly appointed the guardian of the persons and property of said infant

plaintiffs, and all of them, and duly qualified as such guardian, and ever since has been and is now the duly appointed, qualified and acting guardian of the persons and property of each and all of said infants; that said infants do herein appear by the said Hanora Della Flynn, their *prochein ami,* and duly appointed guardian, as aforesaid.

VII.

That said James Flynn, deceased, was the sole support of plaintiffs, and by his labor and exertions maintained and supported said plaintiffs *up the* time of his decease.

VIII.

That on the third day of August, 1903, the vessel "Sophie Christenson" was lying in the harbor of San Pedro, County of Los Angeles, State of California, discharging a cargo of lumber; that said harbor is a navigable body of water connected with the Pacific Ocean and is within the maritime jurisdiction of the United States; that defendants were at said time and are now the owners of said vessel.

IX.

That on said date, and while said vessel was lying in said harbor, discharging cargo as aforsaid, said James Flynn was employed by the owners of said vessel, with others, to remove said cargo from said vessel to the wharf at which said vessel was moored as said lumber was being hoisted from the hold of said vessel.

X.

That while so employed by defendants, and while working in said employ in a usual and proper man-

ner, defendants and their agents, the officers of said vessel, were hoisting from the [7] hold of said vessel the lumber with which said vessel was loaded, the same being hoisted in lots, parcels, or slingloads, made up of heavy planks and timbers, bound together by rope slings.

XI.

That one of said slingloads of lumber was hoisted from the hold of said vessel, under the direction of defendants and its officers, in a grossly negligent manner, and while being so hoisted was handled in so negligent a manner by defendants and their agents, and was so insufficiently secured in said rope sling, and said sling was so inadequately secured and was so inefficient for the purpose for which it was used, that said slingload of lumber broke apart while in the air above the deck of said vessel.

XII.

That some of said pieces of lumber slipped from said sling by and through the negligence of defendants, their officers and agents, and fell upon and struck the said James Flynn while he was working on the deck of said vessel, and without any want of care or negligence on the part of said Flynn; that said plank struck the head of said Flynn with such force that the said Flynn was stunned and made unconscious and within a few hours thereafter the said James Flynn died as the direct consequence of said blow from said plank.

XIII.

That the said sling was weak and inadequate, and of improper material for the purpose for which the

same was being used, and was insufficient in size, and was too short to admit of the same being properly adjusted and fastened to secure said slingload of lumber [8]

XIV.

That the officers and agents of said vessel in charge of hoisting said lot of lumber from said hold were grossly careless and negligent in the manner of hoisting same and in the means employed by them for so doing.

XV.

That the negligence and carelessness of defendants and their agents above set out directly caused the death of said James Flynn, without fault on his part, and while he was engaged in carrying out, in a careful manner and without negligence on his part, the work for which he was employed by defendants.

XVI.

That plaintiffs by said negligence of defendants and by the death of said James Flynn are deprived of the care and support and maintenance they received from said James Flynn, and which said Flynn would have continued to contribute, and have suffered great mental anguish from his said death, and are damaged and damnified by his said death, and by said acts of defendants resulting in his death, in the sum of Twenty Thousand ($20,000) Dollars.

XVII.

That all and singular the premises are true and are within the admiralty jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelants pray that process in due form of law, according to the course of this Honorable Court in cases of admiralty jurisdiction, may issue against the said E. A. Christenson, Hans J. Lunvaldt, Charles E. Sudden, J. H. Baxter, A. Taveira, W. B. Godfrey, Jr., F. M. De Lano, Walter V. Rohlffs, [9] R. L. Anderson, Geo. F. Quigley, D. W. C. Tietjen, Cecilia F. Sudden, Henry Brooks, R. L. Taylor, Robert Sudden, Jas. Johnson, Co., a Corporation, Albert Rowe, J. J. Staiger, Edmund Jacobs, R. C. Sudden, George Johnson, John L. Hubbard, H. Piltz, Louis Poole, and that they may be required to answer under oath this libel and the matters herein contained; and that this Honorable Court would be pleased to decree the payment of the damages aforesaid with costs, and that the libelants may have such other and further relief as in law and justice she may be entitled to receive.

HANORA DELLA FLYNN,

Guardian and *Prochein Ami* of Infant Libelants, David James Flynn, Barbara Flynn, and John Flynn.

PLATT & BAYNE,
HAROLD E. PLATT,
GEO. J. LEOVY,
Proctors for Libelant.

State of California,
Southern Dist. of California,—ss.

Subscribed and sworn to before me this 19th day of November, 1904, by Hanora Della Flynn, and by

Hanora Della Flynn, guardian and *prochein ami* of infant libelants.

HANORA DELLA FLYNN.

[Seal] WM. M. VAN DYKE,

Clerk U. S. Circuit Court, Southern District of California.

By Chas. N. Williams,
Deputy.

Service of the within accepted this 25th day of November, 1904.

FRANK and MANSFIELD,
Attorneys for All Defts.

[Endorsed]: Filed Nov. 25, 1904, at 10 o'clock and 55 minutes A. M. Geo. E. Morse, Clerk. By J. S. Manley, Deputy Clerk. [10]

In the District Court of the United States, in and for the Northern District of California.

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, Infants, by Their Guardian and *Prochein Ami,* HANORA DELLA FLYNN, HANORA DELLA FLYNN,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVEIRA, W. B. GODFREY, Jr., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY,

D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON CO., a Corporation, ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE.

(Answer to Amended Libel.)

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States for the Northern District of California:

The answer of E. A. Christenson, Hans J. Lunvaldt, Charles E. Sudden, J. H. Baxter, A. Taveira, W. B. Godfrey, Jr., F. M. DeLano, Walter V. Rohlffs, R. L. Anderson, Geo. F. Quigley, D. W. C. Tietjen, Cecelia F. Sudden, Henry Brooks, R. Y. Taylor, Robert Sudden, Jas. Johnson Co., a Corporation, Albert Rowe, J. J. Staiger, Edmund Jacobs, R. C. Sudden, Geo. Johnson, John L. Hubbard, H. Piltz and Louis Poole, to the Amended Libel of David James Flynn, Barbara Flynn and John Flynn, infants, herein appearing by their guardian and *prochein ami* Hanora Della Flynn, Hanora Della Flynn, in a cause of action, civil and maritime, alleges:

I.

Answering unto the Fourth Article in said amended libel, these respondents are ignorant of the matters and things therein set forth, so that they can neither admit nor deny the same, wherefore they call for proof thereof. [11]

II.

Answering unto the Fifth Article in said amended libel these respondents are ignorant of the matters and things therein set forth, so that they can neither admit nor deny the same, wherefore they call for proof thereof.

III.

Answering unto the Sixth Article in said amended libel these respondents are ignorant of the matters and things therein set forth, so that they can neither admit nor deny the same, wherefore they call for proof thereof.

IV.

Answering unto the Seventh Article in said amended libel these respondents are ignorant of the matters and things therein set forth, so that they can neither admit nor deny the same, wherefore they call for proof thereof.

V.

Answering unto the Ninth Article in said amended libel, these respondents admit that while said vessel was lying in said harbor discharging cargo, men were employed to remove said cargo from said vessel to the wharf at which said vessel was moored as said lumber was being hoisted from the hold of said vessel, but as to whether or not said James Flynn in said amended libel mentioned was one of the men so employed, these respondents are ignorant, so that they can neither admit nor deny the same, wherefore they call for proof thereof.

VI.

Answering unto the Tenth Article, these respond-

ents admit that the officers and crew of said vessel were hoisting from the hold of said vessel the lumber with which said vessel was loaded, the same being hoisted in lots, parcels or slingloads made up of heavy planks and timbers bound together with rope [12] slings, but whether said James Flynn was one of the men employed in said operation, or whether he was working in said employ in a usual and proper manner, these respondents are ignorant, so that they can neither admit nor deny the same, wherefore they call for proof thereof.

VII.

Answering unto the Eleventh Article in said amended libel, these respondents deny that any of said slingloads were hoisted from the hold of said vessel under the direction of said respondents, or of any or either of them, and they further deny that said respondents, or any or either of them, were at all present, or in anywise whatsoever participated in the work of unloading said vessel.

These respondents further, upon their information and belief, deny that any of said slingloads of lumber were hoisted from the hold of said vessel in a negligent manner, or were handled in a negligent manner, or that the same or any of them were insufficiently secured in said rope sling, or that the said sling was inadequately secured, or was inefficient for the purpose for which it was used, or that said slingload of lumber broke apart while in the air above the deck of said vessel.

VIII.

Answering unto the Twelfth Article, these re-

spondents deny that some or any of said pieces of lumber slipped from said sling, by or through the negligence of these respondents or of any of them, and further on their information and belief deny that some or any pieces of lumber slipped from said sling by or through the negligence of any of the officers or agents of [13] these respondents. As to the allegation in said article that some pieces of lumber fell upon and struck the said James Flynn, these respondents are ignorant, so that they can neither admit nor deny the same, wherefore they call for proof thereof. But said respondents admit that some pieces of lumber fell and struck a man working on board said ship, but deny that the same was without any want of care or without negligence on the part of the man so hurt. On the contrary, these respondents upon their information and belief allege that the said accident to the said man was due solely and entirely to his own negligence.

As to the allegation therein that the same James Flynn died as the direct consequence of said blow from said plank, these respondents are ignorant, so that they can neither admit nor deny the same, wherefore they call for proof thereof.

IX.

Answering unto the Thirteenth Article in said amended libel, these respondents upon their information and belief deny that said sling was weak or inadequate, or of improper material for the purpose for which the same was being used, or that the same was insufficient in size, or was too short to ad-

mit of the same being properly adjusted or fastened to secure said load of lumber.

X.

Answering unto the Fourteenth Article in said amended libel, these respondents on their information and belief deny that the officers or agents of said vessel in charge of the hoisting of said lot of lumber from said hold were careless or negligent in the manner of hoisting the same, or in the means employed by them for so doing. [14]

XI.

Answering unto the Fifteenth Article in said amended libel, these respondents deny that any negligence or carelessness on the part of said respondents, or either of them, caused the death of said James Flynn. And they further deny, upon information and belief, that any carelessness or negligence on the part of their agents, caused the death of said James Flynn, or that said death was caused without fault on his part, or that said James Flynn was then or there engaged in a careful manner, and without negligence on his part, in the work for which he was employed by respondents.

XII.

Answering unto the Sixteenth Article in said amended libel, these respondents are ignorant of the matters and things therein set forth, so that they can neither admit nor deny the same, wherefore they call for proof thereof.

XIII.

Answering unto the Seventeenth Article, these re-

spondents deny that all or singular the premises in said amended libel set forth are true.

WHEREFORE, these respondents pray that said amended libel be dismissed, and for their costs incurred herein.

E. A. CHRISTENSON,
For Self and Co-owners.
NATHAN H. FRANK,
Proctor for Respondents.

Northern District of California,—ss.

Sworn to before me this 13th day of May, A. D. 1905.

[Seal] JOHN FOUGA,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed May 13, 1905. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk. [15]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

IN ADMIRALTY.

DAVID JAMES FLYNN et al.,
Libelants,

vs.

CHARLES E. SUDDEN et al.,
Respondents.

Notice of Taking Deposition of D. W. Nilsson.

To Messrs. Rice and Bayne, Horace G. Platt, Esq., and George J. Leroy, Esq., Proctors for David James Flynn et al., Libelants Herein.

You are hereby notified that D. W. Nilsson will be examined, *de bene esse,* in the above-entitled cause, on behalf of the respondents before Geo. E. Morse, Esquire, duly appointed by the District Court of the United States for the Ninth Circuit, Northern District of California, a United States Commissioner, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the Act of Congress in that behalf, on the 17th day of September, A. D. 1904, at 10 o'clock A. M., at the offices of Messrs. Frank and Mansfield at Room 23, No. 206 Sansome St., in the City and County of San Francisco, in the District aforesaid; and you are hereby further notified to then and there appear and propound such questions to said witness as you may deem fit.

The cause for taking the deposition of the above-named witness is that he is bound on a voyage to sea.

Yours, etc.,

FRANK and MANSFIELD,

Proctors for Respondents.

San Francisco, September 15th, 1904.

Service of a copy of the within notice admitted this 15 day of Sept., 1904.

PLATT & BAYNE,

Proctors for Libelants. [16]

In the District Court for the United States, in and for the Northern District of California.

No. 13,310.

DAVID JAMES FLYNN et al.,

Libelants,

vs.

CHARLES SUDDEN et al.,

Respondents.

Deposition of D. W. Nilsson, for Respondents.

BE IT REMEMBERED: That on Saturday, September 17, 1904, pursuant to the notice hereunto annexed, at the office of Messrs. Frank and Mansfield, Room 23, No. 206 Sansome Street, in the city and County of San Francisco, State of California, personally appeared before me, George E. Morse, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., D. W. Nilsson, a witness produced on behalf of the respondents in the above-entitled matter.

Nathan H. Frank, Esq., of the firm of Messrs. Frank and Mansfield, appeared as proctor for the respondents, and Horace G. Platt, Esq., of the firm of Messrs. Platt & Bayne, appeared as proctor for the libelants.

And the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did thereupon depose and say as is hereinafter fully set forth:

(Deposition of D. W. Nilsson.)

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of W. W. Nilsson may be taken *de bene esse* before George E. Morse, Esq., a United States Commissioner for the Northern District of California, and in shorthand by L. Seidenberg. [17]

It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the mode, time and place of taking the same are waived, and that all objections as to the materiality and competency of the testimony are reserved to both parties.

It is also stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.) [18]

D. W. NILSSON, called for the respondents, sworn.

Mr. FRANK.—Q. What is your name?

A. My name is D. W. Nilsson.

Q. Age and occupation? A. Sailor.

Q. Your age? A. 26.

Q. Are you about to proceed on a voyage to sea?

A. Yes, sir.

Q. You are now on board the "Sophie Christensen"? A. Yes, sir.

Q. And you are going off in her when she is unloaded and discharged?

A. So far as I know at present I am going in her. I don't know if there is going to be a change.

Q. You are now on board of her, and she is about to proceed to sea? A. Yes, sir.

(Deposition of D. W. Nilsson.)

Q. Were you a member of the crew of the "Sophie Christensen" when this man, James Flynn, got hurt on board the vessel? A. I was, sir.

Q. What were your duties at that time?

A. I was driving the donkey on board at that time.

Q. The donkey-engine? A. Yes, sir.

Q. The vessel was discharging lumber at the wharf? A. Yes, sir.

Q. How far had she gotten along with her discharging; had the deckload been taken off? [19]

A. Well, there was something on deck, but they were working in hold, too.

Q. At the time of the accident, where was Flynn working?

A. Right abreast of the mizzenmast.

Q. On deck? A. On deck, sir.

Q. What was he doing there?

A. He was going to make a load up, of lumber.

Q. Making up a slingload? A. Yes, sir.

Q. How many slings did you have in operation?

A. Well, there were two men working on each side on deck, and, if I am not mistaken, there were two men down in the hold and were working there.

Q. That is not what I mean. What I want to know is, how many yards did you have, how many booms?

A. There was only one boom, one cargo-gaff.

Q. And that cargo-gaff swung in on board the ship and was made fast to one of these slingloads, and then the sling was raised and it swung out over the

(Deposition of D. W. Nilsson.)

wharf and allowed the load to be discharged on the wharf?

A. The gaff is hanging loose up there; that is a halyard; that is what they call a fall halyard, and is inside close to the mast, and there is a wire hanging from the cross-tree, at the masthead; right down at the end of the gaff—there is a wire runs from the end of the gaff, and at one end is a hook, and the other end was through that gaff, up through in a block and on to the drum on the winch; that is the way it goes there.

Q. Now, this hook at the end of this rope is fastened into the [20] rope that makes the sling, is it?

A. No.

Q. How is it?

A. That hook is spliced into the wire; either so, or an eye is spliced through the hook, which might be a shackle; either way; either the wire is spliced on to the hook, or there might be an eye in the shackle.

Q. I understand that. What I mean is, the hook in the wire comes down, the man on deck takes this hook and puts it into the load, and up she goes, and the sling itself is separate? A. Yes, sir.

Q. How is the sling itself made?

A. The sling is made of rope, and that is spliced in an eye at the end.

Q. And how is it fastened around the lumber?

A. We take one end around the lumber, and the other end we bring it through the first eye and take it up and put the eye on the hook of the donkey-fall.

Q. That is, the rope has an eye at one end. Can

(Deposition of D. W. Nilsson.)

you draw, and show us how it is fastened on the donkey-fall?

(Witness draws on a piece of paper.)

Mr. FRANK.—That is the open sling (indicating). We will mark that "A."

Q. That is the sling before it is put on the load?

A. Yes, sir.

Q. Go on.

A. (After drawing again.) That is as close as I can make it.

Q. "B," then, is the sling when it is around the load of lumber? A. Yes, sir. [21]

Mr. FRANK.—We offer that in evidence and ask that it be marked Respondents' Exhibit "A."

(The drawing is marked Respondents' Exhibit "A.")

Q. Now, as I understand you, No. 1 in this figure "B" on Exhibit "A" is an eye in the end of the sling? A. That is correct, sir.

Q. And the rope that goes around the slingload passes directly through that eye and up to No. 2 where it is caught upon the hook which comes down from the boom-tackle? A. That is correct.

Q. And that is the way the load is raised up?

A. Yes, sir. They always put the sling a little more on one end. If you hoist the load up like that she goes right on up; they always take the sling a little more closely to one end so as to get a chance to hoist it out.

Q. In hoisting up the load, instead of being horizontal, it is at an angle? A. Yes, sir.

(Deposition of D. W. Nilsson.)

Q. At the time of this accident, just state how it happened and what the circumstances were.

A. It was in the morning; we started to work the same as usual, and everything went all right until about 8 o'clock. I was heaving up a load of lumber, and when I got the load up high enough, the gaff was hanging out a little, so she came over the wharf like. While she was hanging so, between the rail and the vessel, something like that (indicating)—

Q. We cannot get that into the record. It was between the rail—

A. Hanging over the rail like.

Q. What happened?

A. And then a few pieces—I don't know how many—six [22] or seven of those short planks fell out, and they fell right between, into the water. Well, the mate was singing out for those people on deck to stand clear.

Q. Did you holler out, too?

A. Not that time; I don't think I did; I might have, but I am not quite sure. Just after a little while those planks that were left, they fell off the sling and fell in the same direction that man was at work. If the three of them, the planks, fell that is more than I remember, because I got kind of excited when I saw the man get hurt. So I don't remember whether those two planks fell down or not, or whether one plank struck him; I can't say anything about that.

Q. How did they strike him?

A. The man was standing with his back to the load,

(Deposition of D. W. Nilsson.)

and the plank just hit him in the back of the head, with the end of the plank.

Q. Do you know whether or not the man had stood clear when the mate called out, and went back again to his work? A. I don't know that.

Q. You do not know? A. I don't know that.

Q. Were you inside of the donkey-house?

A. If that man was away and came back again, that is more than I can tell, because I had my eyes on that load then. So I can't say anything about that, whether he was away or not.

Q. How about those slings? Were those the usual or customary slings used on board vessels?

A. They were, so far as I know.

Q. You have been in the business how long? [23]

A. I have been in there about a year, in the lumber trade. I have been always sailing to the Hawaiian Islands before. I hardly think it was a year I was in the lumber trade when that happened.

Q. There was nothing carried away at that time?

A. Nothing carried away.

Q. The only thing was, that some of the lumber slipped out of the sling?

A. That is all; that is all.

Q. Did you examine this sling? What kind of rope it was; whether it was new rope or old rope?

A. I did not. So far as I remember, I think they were all good slings.

Q. The slings did not break, that you do know?

A. I know they didn't break.

(Deposition of D. W. Nilsson.)

Cross-examination.

Mr. PLATT.—Q. Mr. Nilsson, how long had you been at work on this vessel, the "Sophie Christensen," at that time?

A. That was the second trip I was on her.

Q. What were your duties on the trip?

A. I was donkey-man and sailor.

Q. Had you previously run the donkey-engine in unloading and loading her? A. Yes, sir.

Q. Did you always use the same kind of sling?

A. We used a chain-sling when we took the lumber in.

Q. Why did you use a chain-sling when you took the lumber in?

A. Well, because—I can't tell that; that is the order of the ship. [24]

Q. You don't know why they use the rope? Did you always use a rope-sling when you unloaded the lumber? A. We did.

Q. That was only your second trip? A. Yes, sir.

Q. Therefore, you only unloaded the lumber once before?

A. Yes, sir; and heaved it out, too.

Q. And so that is the only time you unloaded the lumber? A. Yes, sir.

Q. Both times when you loaded, did you use the chain? A. Yes, sir.

Q. How many times was the chain turned around the lumber to make the sling?

A. About two fathoms were fastened to the wire, to the hook, just the same as that wire fall. They

(Deposition of D. W. Nilsson.)

shackled the piece of chain, about a couple of fathoms long, and in the other end of the chain is a hook.

Q. Did the chain go around the lumber once or twice?

A. It went around the lumber once.

Q. Have you ever run the donkey-engine on any other vessel besides the "Sophie Christensen"?

A. That was the first time I drove the donkey.

Q. Had you on any other vessel taken any part in the loading or unloading of lumber? A. No.

Q. Then, had you ever noticed before, on any other vessel, the manner in which they made the sling for loading or unloading the lumber?

A. I can't hardly answer that question. I was around those lumber vessels before I started to sail on the "Sophie Christensen." [25]

Q. Then you don't remember whether they made the slings in any other way or not?

A. I think rope is used on all vessels when discharging vessels.

Q. I want to know what you know, not what you think. Do you remember now having paid any particular attention to the way in which they made rope slings on any other vessel than the "Sophie Christensen"?

A. I can't tell on any other vessels, when I haven't been in them.

Q. Had you been in the lumber trade on any other vessel beside the "Sophie Christensen"?

A. No, sir.

Q. What sort of vessels have you been on before?

(Deposition of D. W. Nilsson.)

A. I went sailing down to the Islands in traders, in the trade between the Islands and San Francisco.

Q. What sort of vessels were those?

A. They were squared rigged; they went down with a general cargo and came up with sugar.

Q. Did you have anything to do with making slings on those vessels?

A. We were making up loads while down at the Islands.

Q. You don't know how they made the slings?

A. There were double slings.

Q. That is, the rope went around the load twice.

A. There was no lumber; there were sacks and hay and barrels and those things.

Q. And on those things the rope went around twice, instead of once.

A. The slings were differently made altogether? [26]

Q. Suppose you take a piece of paper, and show us how they made the slings on those vessels.

A. (After drawing on paper.) That is supposed to be sacks there, or something.

Q. That is the way the sling is when you load sacks?

A. Those parts (indicat*ion*) ought to be a little wider out.

Q. That is the parts of the sling have to be wider apart?

A. That is, one there, and that one there.

Mr. PLATT.—Mr. Reporter, by "that one there" he means that the two ropes of the sling, instead of

(Deposition of D. W. Nilsson.)

being as he has drawn them, are where letters "a" and "b" are marked. I offer this in evidence as Libelants' Exhibit "A."

(The drawing is marked Libelants' Exhibit "A.")

Q. Then that is the usual sling, the one you have drawn and which is marked Libelants' Exhibit "A"; that is the one you had used before you had gone on the lumber schooner?

A. Yes, sir. They have those slings on lumber schooners when taking on loads of such things.

Q. Then you have the double slings shown in Libelants' Exhibit "A"; you have that double sling on the "Sophie Christensen"?

A. There is such a sling on board all right.

Q. Did you ever see it used?

A. When they are taking laths and shingles out they use double slings.

Q. Why do they use double slings in taking laths and shingles out?

A. I think they used single slings, too, if I am not mistaken, when we were taking shingles out.

Q. For laths and for shingles?

A. Shingles I think we took out. [27]

Q. Were you using the double sling when Flynn was hurt? A. No, sir.

Q. When you state that the single sling is usually used in the lumber trade, you mean it is the usual one used on the "Sophie Christensen." You never saw one used on any other lumber vessel? A. Yes, sir.

A. Your previous experience in unloading vessels

(Deposition of D. W. Nilsson.)

has been on vessels carrying other merchandise than lumber? A. Yes, sir.

Q. And they used the double sling? A. Yes, sir.

Q. Now, from your observation on unloading lumber, if there had been a double sling around this load of lumber would the planks have fallen out?

A. There wouldn't be a bit of difference.

Q. You see no advantage in two ropes around a load of lumber, over one rope?

A. That is just the same as one rope.

Q. But there are two ropes around the sacks and they are spread out?

A. They are not spread out in using the double sling for lumber.

Q. You never saw them use a double sling for lumber? A. No, sir.

Q. When they use a double sling for sacks they spread them out, do they not? A. Yes, sir.

Q. How do you know they use them together on lumber, if you never saw it done?

A. That is the same thing as a single one, because they don't spread them out.

Q. Why do they spread them out on sacks?

A. Sacks are not as long as that and they have to spread them out, [28] and if they used one rope around the sacks it would not spread.

Q. Why not use one rope in discharging sacks?

A. Because I don't think one rope would do in discharging sacks.

Q. Why not?

A. Because the load would go out on either side.

(Deposition of D. W. Nilsson.)

Q. Why would not lumber go out on either side?

A. I don't understand, but in my opinion it is just as good.

Q. You can give no reason? A. No, sir.

Q. How do you explain this lumber falling out of this sling? A. It slided out.

Q. Would it not be more difficult to slide out if two ropes were used instead of one?

A. No difference, in my opinion.

Q. Why not, if the two ropes were spread out around the load of lumber?

A. But those two parts are close together.

Q. But I am asking you, if they were spread out, like you described they were on the sacks, would not that be safer?

A. No, not that way, but I think one thing, if you got a double sling or single sling, it is proper to take a round turn.

Q. It would be safer? A. Yes, sir.

Q. If you used two ropes, with a round turn, it would be safer than one?

A. No, one is as safe as two.

Q. Then I ask you why they spread out the ropes on sacks? A. That is a different load.

Q. They are loads just the same; you are lifting material up to leave on the wharf?

A. No, but you are not slinging loads of lumber; so that both ends go up even.

Q. If you were slinging a load of laths, you would spread the ropes out?

(Deposition of D. W. Nilsson.)

A. It is necessary to spread them out when laths are taken out. [29]

Q. Will you explain why it is necessary to spread out the ropes in lifting sacks and not in lifting lumber?

A. I say, if a man had a double sling of lumber, the rope is close together, anyway, the same as a single one.

Q. You told me you never saw them use a double sling for lumber. How can you say that?

A. That is my belief.

Q. You never saw it done with a double sling?

A. No. We might use a double sling on the "Sophie Christensen," but I can't say that.

Q. Therefore, you cannot say that if they use a double sling, they will be close together?

A. My opinion would be it would be close.

Q. That is your opinion. You do not know it would be? A. No.

Q. Can you explain why these boards, whatever you had, fell out of this sling?

A. I can't very well say how it was, but they fell out; I know that; the reason why, I don't know.

Q. You say when they fell, this man Flynn had his back to the load? A. That is true.

Q. And they fell and struck him before he saw them? A. Yes, sir.

Q. You were around the engine at the time?

A. I was, sir.

Q. Was anybody else working with Flynn?

A. One of the sailors.

(Deposition of D. W. Nilsson.)

Q. What is his name?

A. Nils Soderquist, if I am not mistaken.

Q. He was not struck, was he?

A. I think the plank slided along his arm, I think; that is all he said about it.

Q. You say that first some six or seven planks fell, and they fell into the water, and then the others followed? [30]

A. They were hanging still for a minute or two; they didn't fall out at the same time as the short pieces.

Q. Had you seen any loads like that fall out before?

A. Not like that; single pieces might drop out sometimes; but not a full load like that.

Q. Single pieces might fall out?

A. When we got all kinds of lumber in the sling, there might be some loose pieces in the center of the load, and there might be some pieces dropping out, and that might happen all right.

Q. Suppose you were to make a sling long enough to take a double rope around the load, instead of just one, would not that be apt to hold the lumber more tightly and securely in the sling than if you had but one rope around it?

A. That might be all right; that might be safer, but at the same time—

Q. Never mind that. You say it would be safer?

A. Oh, yes; I believe they wouldn't slip exactly so easy.

Mr. FRANK.—Now, make your explanation; fin-

(Deposition of D. W. Nilsson.)

ish your answer. You said, "But at the same time."

A. Even so, if they take a round turn, there is some lumber dropping out anyway.

Mr. PLATT.—Q. It would be safer?

A. I think it would be a little safer, all right.

Redirect Examination.

Mr. FRANK.—Q. Now, Mr. Nilsson, I understand you to say that in discharging sacks of sugar, the sacks have to go straight up?

A. That is what they have, or else fall out.

Q. They have a short load and a high load?

A. Twelve or fifteen bags.

Q. One on top of the other. The lumber has to go up slantingly, [31] and if it did not you could not get it out of the hold, and therefore you have to have the spread slings for the sacks to get them up straight, and to get the lumber out of the hold—

A. They be exactly in one place.

Q. Otherwise you could not raise your lumber properly to get it out of the hold. That is right?

A. Yes, sir; even so, if you should spread your slings, it wouldn't make any difference; the lumber is to one side, anyway.

Q. It is the slanting of the load that makes it slip out? A. Dangerous to slip out.

Q. I understand you to say that happens right along?

A. Sometimes one piece might be a little bigger than another; it goes up like that (indicating a slanting position), and it slides out.

(Deposition of D. W. Nilsson.)

Q. The people working there expect a load to slip out sometimes?

A. When some pieces fall out, they can easily see it is a dangerous load.

Q. I mean the people in the habit of discharging cargoes know it is likely to happen; expect that?

A. Whenever they see a piece of lumber drop out, they stand clear.

Q. Whenever they make up a slingload, and the load is being started to raise, is it not the business of those people to stand clear immediately?

A. That's what it is.

Q. And if a man is working on one load and knows another is being slung up, it is his business to stand clear? A. Yes, sir.

Recross-examination.

Mr. PLATT.—Q. Do you mean to say when a man is fixing his load, he expects it to fall?

A. No, sir, sure not. He understands when a load is going up, [32] and if they see anything fall out, they should stand clear.

Q. Then, in answering Mr. Frank, you mean to say that if a load is going up and a man sees a piece fall out, he is expected to stand clear?

A. I understand him to say that.

Q. You did not mean to say that the man who is fixing the sling is expected to stand clear; he is not expected to stand clear unless he sees a piece fall out?

A. When a man makes up a load, he is making it the best he can, not to slip out.

(Deposition of D. W. Nilsson.)

Q. And if he had to stand clear while one load left until it got on the wharf, he would have to quit work until it is done?

A. If he sees it is a dangerous load.

Q. But if he does not see it is a dangerous load, he is expected to go on working, making up another load? A. Yes, sir.

Q. He is working where the lumber is?

A. Yes, the spot where the load is going up there; he has to be there all the time.

Q. He is not excepted to stand clear, and does not stand clear, unless he sees it is a dangerous load?

A. The mate has his eye on the load, and when he sees anything wrong, he sings out.

Q. It is the duty of the mate, then, to watch the load and sing out if there is any danger.

A. Yes, sir; he did watch it. He watches every load that goes out, and takes hold of the load and swings it over the rail.

Q. It is the duty of the mate to watch it and warn them of any danger? A. Yes, sir.

Q. You say that in order to get lumber out of the hold, you have to fix the sling a little nearer to one end, so that the load goes up slanting?

A. Yes, sir. [33]

Q. You could do the same thing with two ropes, fastened to one side, could you not? A. Yes, sir.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, George E. Morse, a United States Commissioner

for the Northern District of California, do hereby certify:

That the reason for taking the foregoing deposition, and the fact is, that the testimony of the witness, D. W. Nilsson, is material and necessary in the cause in the caption of the said deposition named, and that he is bound on a voyage to sea, and more than one hundred miles from the place of trial before the time of trial.

I further certify that on Saturday, the 17th day of September, in the year one thousand nine hundred and four, at 11:15 o'clock A. M. of said day, I was attended by H. G. Platt, Esq., proctor for the libelants, and Nathan H. Frank, Esq., proctor for the respondents, and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition was, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by L. Seidenberg, and afterwards reduced to typewriting; that the reading over and signing of the said deposition by the witness was, by the aforesaid stipulation, expressly waived.

Accompanying the deposition and annexed thereto and forming a part thereof are Respondents' Exhibit "A" and Libelants' Exhibit "A," introduced in connection therewith and referred to and specified therein.

I further certify that I have retained the said deposition [34] in my possession for the purpose of

delivering the same with my own hand to the United States District Court for the Northern District of California, the Court for which the same was taken.

And I further certify that I am not of counsel, nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed my seal of office, at my office in the City and County of San Francisco, State of California, this 23d day of September, 1904.

[Seal] GEO. E. MORSE,

United States Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Sept. 23, 1904. George E. Morse, Clerk. By John Fouga, Deputy Clerk. [35]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

IN ADMIRALTY.

DAVID JAMES FLYNN et al.,

Libelants,

vs.

CHARLES E. SUDDEN et al.,

Claimants.

Notice of Taking Deposition of George T. Cainan.

To Messrs. Frank & Mansfield, Proctors for Claimants.

You are hereby notified that George Cainan will be

examined, *de bene esse,* in the above-entitled cause, on behalf of the libelants before James P. Brown, Esquire, United States Commissioner for the Northern District of California, at San Francisco, on the 18th day of July, A. D. 1905, at 9:30 A. M., at the office of Messrs. Andros & Hengstler, room No. 6, in the building situated on the northeast corner of Sansome and Halleck Streets, and number 320 on Sansome Street, in the city of San Francisco, in the District aforesaid; and you are hereby further notified to then and there appear and propound such questions to said witness as you may deem fit.

The cause for taking the deposition of the above-named witness is that he is bound on a voyage to sea.

Yours etc.,

ANDROS & HENGSTLER,

Proctors for Libelants.

San Francisco, July 17, 1905.

Service of a copy of the within notice admitted this 17th day of July, 1905.

FRANK and MANSFIELD,

Proctors for Claimants. [36]

In the District Court of the United States, in and for the Northern District of California.

No. 13,310—IN ADMIRALTY.

DAVID JAMES FLYNN et al.,

Libelants,

vs.

CHARLES E. SUDDEN et al.,

Claimants.

Deposition of George T. Cainan, for Libelants.

BE IT REMEMBERED: That on Tuesday, July 18, 1905, pursuant to the notice hereunto annexed, at the office of Messrs. Andros & Hengstler, Room No. 6, 320 Sansome Street, in the City and County of San Francisco, State of California, personally appeared before me, James P. Brown, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., George Thomas Cainan, a witness produced on behalf of the libelants in the above-entitled matter.

L. T. Hengstler, Esq., of the firm of Messrs. Andros & Hengstler, appeared as proctor for the libelants, and Nathan H. Frank, Esq., of the firm of Messrs. Frank & Mansfield, appeared as proctor for the claimants.

And the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did thereupon depose and say as is hereinafter fully set forth. [37]

(It is hereby stipulated that the testimony of George Thomas Cainan may be taken in shorthand by Louis Seidenberg, and thereafter written out, and the reading over and signing of said testimony by the witness is hereby waived. All other rights under the notice for taking said deposition are reserved.)

ANDROS & HENGSTLER,
Proctors for Libelants.
FRANK and MANSFIELD,
Proctors for Claimants. [38]

(Deposition of George Thomas Cainan.)

GEORGE THOMAS CAINAN, called for the libelants, sworn.

Mr. HENGSTLER.—Q. 1. What is your name, age and occupation?

A. George Thomas Cainan.

Q. 2. How old are you? A. Twenty-four.

Q. 3. What is your occupation. A. Seaman.

Q. 4. Are you engaged on any vessel at the present time? A. No, sir.

Q. 5. Are you looking for a ship? A. Yes, sir.

Q. 6. To go to sea? A. Yes, sir.

Q. 7. Do you intend to go to sea as soon as you find one? A. Yes, sir.

Q. 8. Where were you in August, 1903, Mr. Cainan?

A. On board the schooner "Sophie Christenson."

Q. 9. You remember any particular event that happened during that month aboard that schooner?

A. Yes, sir.

Q. 10. What was it? Just state generally.

A. About the accident, it is?

Q. 11. Yes. On what day did the accident happen on board that schooner? A. On the 3d of August.

Q. 12. Where was the schooner at that time?

A. Along the San Pedro Lumber Company's wharf.

Q. 13. What work, if any, was going on on the deck of the schooner? A. She was discharging lumber.

Q. 14. How many men were engaged in discharging lumber on deck? A. Six.

Q. 15. Was the lumber being discharged from the

(Deposition of George Thomas Cainan.)

hold or from the deck, if you remember?

A. From the deck, sir.

Q. 16. Were there any men engaged in the work on the wharf? A. On the wharf?

Q. 17. Yes.

A. Not belonging to the ship; they belonged to the lumber company. [39]

Q. 18. But they were helping in discharging, were they? A. Yes, sir.

Q. 19. How many of them?

A. I couldn't tell you exactly how many there were.

Q. 20. What were the men on deck doing?

A. Making slingloads.

Q. 21. And how many of them were engaged in that? A. Six, sir.

Q. 22. Were there any, besides the men making slingloads on the deck, doing any discharging?

A. There was this Mr. Flynn.

Q. 23. No, besides the six you stated.

A. No, sir, besides the mate giving orders.

Q. 24. The mate was giving orders?

A. Yes, sir.

Q. 25. Where was he?

A. Standing about midships.

Q. 26. Was there anybody else on board at that time?

A. No, there was only the particular crew.

Q. 27. How was the unloading of the lumber done?

A. It was done by the aid of the steam donkey and gaff, single wire.

(Deposition of George Thomas Cainan.)

Q. 28. Who was running the steam donkey?

A. It was a man by the name of Nilsson.

Q. 29. Was he included in the six men on deck?

A. No, sir.

Q. 30. How many gaffs were used in discharging?

A. One, sir.

Q. 31. Whereabouts was that gaff located?

A. It was resting on the main mast, sir.

Q. 32. Resting on the main mast? A. Yes, sir.

Q. 33. And was it fast there, or movable?

A. It was what we call a throat halyard, and a pendant attached to the end of it.

Q. 34. Was it movable?

A. Yes, sir, it was movable.

Q. 35. In what way did it move?

A. How do you mean—how it is movable?

Q. 36. The gaff.

A. We hoisted it to the place we wanted it. [40]

Q. 37. And then?

A. The donkey-fall rose from the blocks at the masthead.

Q. 38. Go on; describe the operation.

A. And rove through the sheath in the gaff.

Q. 39. What did you first do with the lumber that was lying on the deck, in order to move it out of the ship? A. We first made it up in slingloads.

Q. 40. How many men were engaged in doing that?

A. Six, sir.

Q. 41. I mean in making up one slingload.

A. Two, sir.

Q. 42. Do you know who made up the slingload—

(Deposition of George Thomas Cainan.)

A. It was I.

Q. 43. (Continuing.) —in the particular case when the accident happened.

A. It was I and the man named Elliot.

Q. 4. Do you know how to spell his name?

A. E-l-l-i-o-t.

Q. 45. How did you make up that slingload—what did you do?

A. Well, I was on one end of the plank, and this man Elliot at the other, piling it up on each other.

Q. 46. What did you do then?

A. Well, we went and saw these slings—rope slings lying on the deck, what we were supposed to take and put around the lumber.

Q. 47. Did you put it around the lumber?

A. Yes, sir.

Q. 48. In what way?

A. We put it a little to one end on the single turn.

Q. 49. After you had given that single turn, what was done?

A. We put one eye in through the other eye. There were two eyes, one on each end.

Q. 50. Of the rope? A. Yes, sir.

Q. 51. And then?

A. When our turn comes for sending up a load we hook on a sling to the hook of the fall—the donkey-fall.

Q. 52. Then?

A. Then the order was given to the donkey-man, a [41] whistle, to go ahead.

Q. 53. Who gave that order? A. The mate, sir.

(Deposition of George Thomas Cainan.)

Q. 54. Go ahead; describe the rest of the operation.

A. We were all told to get out of the way, of course, when the lumber was going to swing right across the ship.

Q. 55. Go right ahead and tell us what happened after that.

A. The lumber was still going up and shaking back and forth, as they do; no guide at all attached to it; going up it was high enough and came back, and the mate sang out to come back.

Q. 56. What was done then?

A. It struck the stringer of the wharf.

Q. 57. What does "come back" mean in that case?

A. "Come back" is to lower away.

Q. 58. After the load struck the stringer of the wharf, what happened then?

A. It shook the load, and some pieces fell down between the ship and the wharf, and the remaining three pieces swung aboard, and one piece struck this man Flynn.

Q. 59. Where did it strike him?

A. Right on the head, sir.

Q. 60. Did you see the plank strike him?

A. Yes, sir.

Q. 61. What was Mr. Flynn's position at the time, and what was he doing when the plank struck him?

A. He was just lifting a big piece of timber so as for another man to put the block under the piece of timber so as to allow the sling to go underneath.

Q. 62. He was making up a new slingload, was he?

(Deposition of George Thomas Cainan.)

A. Yes, sir.

Q. 63. Whereabouts on the deck was he at that time?

A. Well, he was more near to the mizzenmast.

Q. 64. Near to the mizzenmast, and between what masts? A. The main and the mizzen.

Q. 65. If I understand you, the gaff was swung between the main and mizzen masts, was it?

A. Yes, sir. [42]

Q. 66. The loose end toward the mizzen?

A. Towards aft—the mizzen.

Q. 67. Whereabouts was the donkey-engine located on deck? A. Between the fore and main masts.

Q. 68. And where were you standing when the accident happened?

A. On the starboard side of the ship.

Q. 69. Which side of the ship was lying along the wharf? A. The port side.

Q. 70. What was the height of the deck, with reference to the height of the wharf?

A. Between, you mean?

Q. 71. Yes—which was higher?

A. The wharf, sir.

Q. 72. The wharf was higher? A. Yes, sir.

Q. 73. What was the position of the deck, with reference to being even—horizontal or otherwise?

A. The difference in measurement, you mean?

Q. 74. No; with reference to lying in the same way as the wharf or otherwise—was the deck of the vessel the same way as the wharf?

A. Yes, sir; horizontal.

(Deposition of George Thomas Cainan.)

Q. 75. Horizontal?

A. It had a very little list to port.

Q. 76. What was the effect of that list to port, if any, if you know?

A. Well, that is to allow the lumber to go off to the wharf.

Q. 77. To swing out towards the wharf?

A. To swing out towards the wharf.

Q. 78. Was there any mechanical contrivance or any machinery used for the purpose of making the lumber swing off towards the wharf?

A. No, sir; just the list.

Q. 79. Did anybody help to make the lumber swing out towards the wharf?

A. Very often; if the mate can touch the end of it, he generally guides it out towards the wharf.

Q. 80. Was there any contrivance on the ship for the purpose of preventing the load from swinging back on the deck after it had [43] once swung out?

A. No, sir, no prevention; nothing to prevent it from swinging back.

Q. 81.—With regard to the rope which you put around the load, the particular load that struck Mr. Flynn: Was that, in your opinion, sufficient and safe for the purpose for which it was used?

Mr. FRANK.—I object to that as leading.

Mr. HENGSTLER.—Q. 82. What is your opinion with regard to its safety?

A. My opinion is that the sling was very short, although it was a new piece of rope; it was not long

(Deposition of George Thomas Cainan.)

enough to get a round turn; that means two round turns.

Q. 83. Was it long enough to go around once entirely?

Mr. FRANK.—I object to that as leading.

A. Just one turn of the rope through the eye.

Mr. HENGSTLER.—Q. 84. You call that a round turn? A. That is a single turn, we call it.

Q. 85. You say it was not long enough to make a round turn? A. No, sir.

Q. 86. Had you spoken to anybody about this rope before the accident happened?

Mr. FRANK.—I object to that as leading.

A. Yes, sir.

Mr. FRANK.—I object also to it on the ground that it is immaterial whether this man spoke to anybody or not. We are not bound by anything this man has said in the matter.

A. (Continuing.) We spoke on account of our own safety.

Mr. FRANK.—I move to strike that out as not responsive, and also on the ground that he is not a party to the suit.

Mr. HENGSTLER.—Q. 87. To whom did you speak about it?

A. I spoke to the mate about it, and so did the other men.

Q. 88. Had you experience on lumber vessels before that?

Mr. FRANK.—I object to that as leading, and also

(Deposition of George Thomas Cainan.)

as not [44] proving the nature of the experience of the man.

Mr. HENGSTLER.—Q. 89. What was your experience?

A. My experience was on the coast as seaman, and working with different apparatus.

Q. 90. What apparatus had you been used to in working in loading and unloading lumber on vessels?

A. The same kind of gaff.

Q. 91. With reference to slings, what kind of slings? A. Chain slings—either wire or chain.

Q. 92. Is that the general custom, to use wire or chain slings for the purpose of loading and unloading lumber?

Mr. FRANK.—I object to that, in the first place, on the ground that it is leading; and, in the second place, the witness has not been proved to be an expert, so as to prove what the custom is.

Mr. HENGSTLER.—Q. 93. How long have you been working on lumber vessels, Mr. Cainan?

A. Since 1901, sir.

Q. 94. What is your opinion with regard to the safety of ropes being used for the purpose of hoisting lumber?

Mr. FRANK.—I object to the witness' opinion, as not competent evidence on the subject.

A. Rope is apt to give way under it. The chafing and the corners of the lumber, and the shaking about of the load, will soon wear away the rope sling.

Mr. HENGSTLER.—Q. 95. Has the newness of

(Deposition of George Thomas Cainan.)

the rope any effect on the probability of its giving way? A. Yes, sir.

Mr. FRANK.—I object to that as leading.

Mr. HENGSTLER.—Q. 96. What effect has it?

A. The new rope has always more or less oil in it, and is more slippery.

Q. 97. What contrivances have you found in other lumber vessels [45] that you have been engaged in, for the purpose of steadying a load after it is swung out over the wharf?

Mr. FRANK.—I object to that as incompetent and immaterial.

A. Well, all the vessels I have been in after that time had what we call a Spanish burton.

Mr. HENGSTLER.—Q. 98. What is the purpose of such an apparatus?

A. Well, it is to keep the load above the wharf.

Q. 99. You say this vessel had no Spanish burton?

A. No, sir.

Q. 100. Nor any other contrivance of that kind?

A. No, sir.

Q. 101. Did the unloading of this vessel go on for some time after the accident?

A. Yes, sir, it went on in the same way.

Q. 102. What kind of slings were used after the accident, for the purpose of making up the loads?

Mr. FRANK.—I object to that as incompetent and immaterial.

A. The same slings were used that day. The day after we used the chain.

Mr. HENGSTLER.—Q. 103. Did you see the

(Deposition of George Thomas Cainan.)

captain at the time of the accident on board or in the neighborhood? A. Did I see what?

Q. 104. Did you see the captain of the schooner?

A. The captain at the present time was in the cabin.

Mr. FRANK.—I move to strike that out as not responsive.

Mr. HENGSTLER.—Q. 105. That means you did not see him.

A. I did not see him until a couple of minutes after the accident occurred.

Mr. FRANK.—I object to that—to counsel testifying for the witness.

Mr. HENGSTLER.—Q. 106. Now, Mr. Cainan, I want you to tell here, because I want it in the record, what happened yesterday afternoon, with reference to your giving testimony in this case.

A. This gentleman over there (pointing to Mr. E. A. Christenson)—I don't know exactly what is his name—

Mr. HENGSTLER.—(Addressing Mr. Christenson.) Please be kind [46] enough to give us your name.

Mr. CHRISTENSON.—E. A. Christenson.

A. (Continuing.) —inquired for me at the Seamen's Union Hall, and asked if he couldn't have a talk with me. Well, I had a friend, and I had to go with him to a certain place, so I asked Mr. Christenson if I couldn't come up to his office, or some other place, to talk to him. I said I promised I would be up there about 3 o'clock. So I was busy

(Deposition of George Thomas Cainan.)

with a shipmate of mine, and I forgot all about it until it was too late.

Mr. HENGSTLER.—Q. 107. Did you come to see me in my office afterwards?

A. I came to see you about it.

Q. 108. What for?

A. Just to see if it is necessary—this Mr. Christenson gave me a piece of paper, too, with his address, to call at his place.

Q. 109. With his address? A. Yes, sir.

Q. 110. And he asked you to go to that address?

A. Yes, sir.

Q. 111. Did you go?

A. No, sir, because I had my shipmate waiting outside there all the time.

Q. 112. What time was that—what time did he come to see you at the Sailors' Union?

A. It was after 12.

Q. 113. What did Mr. Christenson say to you at that time?

A. Well, he didn't say anything very particular, only that he wants to have a talk about the accident; simply a talk about the accident.

Cross-examination.

Mr. FRANK.—XQ. 1. Did you go up then to see Mr. Hengstler? A. Yes, sir.

XQ. 2. And your friends? A. Yes, sir.

XQ. 3. Why did you come to Mr. Hengstler?

A. Well,—

Mr. HENGSTLER.—I will tell you why he came—

Mr. FRANK.—I do not want your answer, and I

(Deposition of George Thomas Cainan.)

object to your [47] prompting the witness.

Mr. HENGSTLER.—You know it was an act of the greatest impropriety to approach the witness.

Mr. FRANK.—It was certainly not. You do not own the witness. If you do, I want to find it out. I insist on your not prompting the witness.

Mr. HENGSTLER.—It was detestable practice to approach this witness after he was my witness.

Mr. FRANK.—Are you done?

Mr. HENGSTLER.—Yes.

Mr. FRANK.—(Addressing the witness.) Now, answer the question.

Mr. HENGSTLER.—Just tell him.

Mr. FRANK.—XQ. 4. Why did you come to Mr. Hengstler?

A. I wanted to know what was up, what was going to be; what business I had to go up there.

XQ. 5. What business did you have to come here?

A. It was on my way going up town.

XQ. 6. How did you happen to come here in the first place?

Mr. HENGSTLER.—I object to this question because it is obvious, and ought to be obvious to every attorney, that the witness would naturally come to the attorney whose witness he is when he is approached by the other side in an improper way.

Mr. FRANK.—He was not approached in an improper way, and I object to that statement.

Mr. HENGSTLER.—I do not say that you approached him.

(Deposition of George Thomas Cainan.)

Mr. FRANK.—He was not approached in an improper way.

Mr. HENGSTLER.—I say it is improper to approach witnesses on the other side.

Mr. FRANK.—That may be your opinion. You may think you own the witness.

Mr. HENGSTLER.—I think it is unprofessional.

Mr. FRANK.—It is a good thing that your opinion is not the opinion of the profession, generally. I did not come over here to [48] have a discussion of this kind. I came over here to take this deposition, and I want to take it properly. (Addressing the witness.) Just answer that question, Mr. Witness. (Addressing the Reporter.) Just read the last question.

(The Reporter reads the last question.)

A. How did I happen to come here in the first place?

XQ. 7. Yes.

A. Well, I came here to explain the accident.

XQ. 8. Who brought you here?

A. In the first place, Mrs. Flynn brought me here.

XQ. 9. Mrs. Flynn brought you here?

A. Yes, sir, Mrs. Flynn. It was about the accident.

XQ. 10. When was that?

A. Last Saturday.

XQ. 11. When you came to Mr. Hengstler yesterday about this matter and told him Mr. Christenson had spoken to you about it, what did you say to him? Cannot you answer that question? What is the mat-

(Deposition of George Thomas Cainan.)

ter—why can't you answer the question?

A. I came to see if I—

XQ. 12. (Interrupting.) I did not ask you what you came to see, but what you said to him.

Mr. HENGSTLER.—Tell him what you said about it.

A. I asked him what I ought to do, if I ought to go up to that Christenson office.

Mr. FRANK.—XQ. 13. What did he say to you?

A. He says, "You can do just as you please." I thought myself it is a little too far out of my way, so I went up town. That is the long and short of it.

XQ. 14. That is all there is to it? A. Yes, sir.

XQ. 15. Did you ever speak to anybody about this case before? A. Speak to anybody?

XQ. 16. Yes.

A. I spoke to Mrs. Flynn and told her I was a witness of the accident.

XQ. 17. When?

A. That was about six weeks ago.

XQ. 18. Was that the first time you spoke to her about it? [49]

XQ. 19. The first time you spoke to anybody about it? A. Yes, sir.

XQ. 20. Since then you paid no attention to it?

A. I have been to sea since then.

XQ. 21. Where have you been to sea?

A. Gray's Harbor.

XQ. 22. When did you leave the 'Sophie Christenson''? A. I left her on the trip after that.

XQ. 23. The trip after? A. Yes, sir.

(Deposition of George Thomas Cainan.)

XQ. 24. What vessel did you go on then?

A. I went on the schooner "Sehome."

XQ. 25. Where did you go?

A. Everett, Puget Sound.

XQ. 26. In what trade?

A. In the lumber trade.

XQ. 27. How long did you stay with her?

A. About two months and five days.

XQ. 28. Where did she go?

A. She went down to San Pedro.

XQ. 29. With a cargo of lumber?

A. Yes, sir.

XQ. 30. Did she discharge the cargo down there?

A. Yes, sir.

XQ. 31. From her, what vessel did you go to?

A. The schooner "Honoipu."

XQ. 32. Where did you go on her?

A. Puget Sound.

XQ. 33. From Puget Sound to where?

A. I left here there.

XQ. 34. Where did you go on board of her?

A. I went on board of her at San Pedro.

XQ. 35. She went up empty?

A. She went light.

XQ. 36. You did not handle any cargo?

A. No, sir.

XQ. 37. What vessel did you go on then?

A. The schooner "Muriel."

XQ. 38. Where did you go on her?

A. To San Francisco.

XQ. 39. Cargo? A. Lumber.

(Deposition of George Thomas Cainan.)

XQ. 40. Did she discharge her cargo in San Francisco? A. Yes, sir. [50]

XQ. 41. What was the date of that, do you know?

A. The date I couldn't tell you.

XQ. 42. Cannot you come near it?

A. Last May—May a twelve month.

XQ. 43. What vessel did you go on after that?

A. I went back to Gray's Harbor in the "Muriel," and joined the schooner "Watson E. West," bound for South Africa.

XQ. 44. With a cargo of lumber?

A. Cargo of lumber.

XQ. 45. Did you discharge the lumber down there? A. Yes, sir.

XQ. 46. Right alongside of the wharf?

A. Alongside of the wharf.

XQ. 47. How long did you stay with her?

A. Ten months and nine days.

XQ. 48. Where did you leave her?

A. I left her in Aberdeen. I made the round trip.

XQ. 49. What vessel were you on then?

A. The schooner "Alumna."

XQ. 50. Where did you go then?

A. To San Francisco.

XQ. 51. With a cargo of lumber?

A. Cargo of lumber.

XQ. 52. Where did you discharge that?

A. We were paid off as soon as we came here.

XQ. 53. You did not discharge here?

A. No, sir.

XQ. 54. What vessel were you in next?

(Deposition of George Thomas Cainan.)

A. The "Charles A. Folk."

XQ. 55. Where did you go in her?

A. To Gray's Harbor.

XQ. 56. Did you come here from Gray's Harbor?

A. Yes, sir.

XQ. 57. Did you come back in her?

A. No, sir. I came back in the "Vidette."

XQ. 58. With a load of lumber? A. Lumber.

XQ. 59. Did you discharge it here?

A. Discharged it here.

XQ. 60. How long did you stay in her?

A. Twenty-seven days.

XQ. 61. You say twenty-seven days?

A. I say about twenty-seven days. [51]

QX. 62. You did not make another trip in her?

A. No, sir.

XQ. 63. What vessel did you go in next?

A. I am still here. I just left the bark "Vidette."

XQ. 64. Did you discharge lumber from the "Vidette"? A. Yes, sir. I was donkey-driver.

XQ. 65. Who owns the "Vidette"?

A. The Union Lumber Co.

XQ. 66. What kind of slings did you use on the "Vidette"? A. Chain slings.

XQ. 67. To discharge with? A. Yes, sir.

XQ. 68. Are you positive of that? A. Yes, sir.

XQ. 69. How long had you been discharging the "Sophie Christenson" before this accident happened? A. A day.

XQ. 70. A whole day?

(Deposition of George Thomas Cainan.)

A. No, not exactly a whole day; short of a couple of hours.

XQ. 71. And this happened late in the afternoon?

A. No; early in the morning.

XQ. 72. Of the second day?

A. The second day.

XQ. 73. There were three sets of men at work making up slingloads?

A. Three sets of men.

XQ. 74. Where were they located—where were they discharging from?

A. Two on the starboard side, and four on the port side.

XQ. 75. You were one of the four on the port side?

A. No; I was one of the two on the starboard side.

XQ. 76. You were on the starboard side?

A. Yes, sir.

XQ. 77. The other four were on the port side, on the side lying towards the wharf? A. Yes, sir.

XQ. 78. Every time you made up a load, the mate sang out to stand clear, did he not? A. Yes, sir.

XQ. 79. And he did it on this occasion when the sling went across, did he not?

A. He did when the sling went across.

XQ. 80. When you made up this slingload, where did you go to get your sling from?

A. Amidships.

XQ. 81. You picked it out yourself?

A. Picked it out myself. [52]

XQ. 82. And made up the load with such sizes as you saw fit to fill that sling? A. Exactly.

(Deposition of George Thomas Cainan.)

XQ. 83. When was it you say you spoke to some one about the sling?

A. I suppose about as soon as we started to work.

XQ. 84. Whom did you speak to?

A. I spoke to the mate about it.

XQ. 85. To no one else?

A. No, sir, to no one else.

XQ. 86. Now, every time a load came over, I understand you to say the mate, when he could reach it, guided it on the wharf? A. Yes, sir.

XQ. 87. That is, it would hang down at one end lower than the other, and he would reach his hand over and pass it over to the wharf?

A. The wharf was too high and the lumber was hoisted high enough to clear the wharf.

XQ. 88. He passed it over in that way, did he not, by holding onto one end of it?

A. He didn't touch it that time; he couldn't.

XQ. 89. He did not touch this particular load?

A. No, sir.

XQ. 90. He had been touching all the others?

A. That is, if he could touch them. That was when the high tide was.

XQ. 91. The load, I suppose, swung across slowly. It did not swing across fast, did it?

A. No, it didn't swing very fast.

XQ. 92. With regard to this Spanish burton, that is something that any sailor man can rig up, can he not? A. Yes, sir.

XQ. 93. It is just a system of ropes that the sailors, when they are discharging, if they want to

(Deposition of George Thomas Cainan.)

use a Spanish burton, rig it up and use it. If they do not want to use it, they do not, that is all?

A. Yes, sir.

XQ. 94. What I mean is, it is not like the mast or any permanent part of the ship; it is just some ropes. Whenever they want to use it, they take these ropes and make a Spanish burton, and if they do not want to use it they do not.

A. We do as the mate orders.

XQ. 95. Answer my question: You do that—when you want to use [53] a Spanish burton, you make it yourselves? A. Yes, sir.

XQ. 96. And when you do not use it, it is because you do not make it up yourselves—it is not a permanent part of the ship?

A. It is necessary. It should be there. I seen it done in all vessels.

XQ. 97. You answer my questions. It is not a permanent part of the ship. You take the ropes and make the Spanish burton yourselves whenever you want to use it?

A. Yes, sir, we do that.

XQ. 98. This sling you used was plenty long enough to pass through the eye and to tighten up onto the lumber on your slingload, was it not?

A. Yes, it was just one turn and rove through the eye.

XQ. 99. And you could just tighten it on the lumber the same as if you had two turns?

A. No. When you see—when it is single like that, it allows so much because the top of the plank is flat,

(Deposition of George Thomas Cainan.)

and it allows the sling to go that way, and the load that way (forming a triangle with his two forefingers).

XQ. 100. Cannot you drive the end of the rope down taut?

A. You can drive it, but it would swing back again; you can never—

XQ. 101. How can it swing back? Would not the load turn up to the upright portion of the rope that went through the eye? Why don't you answer the question?

Mr. HENGSTLER.—Finish your answer. You just said, "You can never," and you did not finish what you were going to say.

A. What question is there to answer? Can I show it on something?

Mr. FRANK.—XQ. 102. Take a piece of paper.

A. I will take this book.

XQ. 103. Take a piece of paper and draw it.

A. (After making a drawing on a piece of paper.) One part is underneath and comes up through here (indicating); another part comes [54] that way (indicating). It is rove through the eye. If you happen to squeeze that part down flat (indicating), the plank is bound to jump up again when there is a weight taken away from it.

Mr. HENGSTLER.—You mean the rope is bound to jump up again?

The WITNESS.—Yes. By a round turn, it would just lay flat with the planks all round.

(Deposition of George Thomas Cainan.)

Mr. FRANK.—XQ. 104. Did you try to drive it down on this occasion?

A. Yes, we shoved it down as far as we could with our hands.

XQ. 105. With your hands? A. Yes, sir.

XQ. 106. Now, as I understand you, this had passes clear over the vessel and over to the wharf, and then struck the wharf and most of the load fell in between the wharf and the vessel into the water?

A. Most of the load fell between the wharf and the vessel's side.

XQ. 107. When this was swung over, what were you doing?

A. I was looking at it. We generally look to see that it goes clear of the ship. We don't like to see pieces falling out there every time.

XQ. 108. Did you keep your eye on that slingload?

A. We generally keep an eye on it all the time, on every sling we send up.

XQ. 109. What I want to know is, did you watch that slingload till it struck the wharf and dropped—did you keep your eye on it all the time?

A. I kept my eye on it all the time.

XQ. 110. And before it went up, you were tending to your own business, making up your own pile?

A. Before it went up?

XQ. 111. Yes, making up your own slingload.

A. Yes, that was the particular slingload.

XQ. 112. You were paying attention to your own

(Deposition of George Thomas Cainan.)

business; you were not paying attention to what anybody else was doing?

A. I was looking up at it. I stood looking up there a second or two, looking up to see the sling. [55]

XQ. 113. And you were not paying attention to what anybody else was doing? A. No, sir.

XQ. 114. Now, as I understand you, the objection you have to the use of rope is that it is apt to chafe and give way; is that right? A. Yes, sir.

XQ. 115. That is about the only objection there is to it?

A. And it is slippery at the same time.

XQ. 116. The rope is slippery?

A. When it is new, and when it is old it is chafed.

XQ. 117. Your idea is that rope is more likely to break than chain; is that it? A. Yes, sir.

XQ. 118. Before you went on the "Sophie Christenson," had you been in the lumber trade?

A. Yes, sir.

XQ. 119. How long? A. About five months.

XQ. 120. In what vessel did you go?

A. In the "Bendixen."

XQ. 121. Any other?

A. No, that was the first one.

XQ. 122. Is that the only one? A. Yes, sir.

XQ. 123. You were in her for five months?

A. Yes, sir.

XQ. 124. Where did you go in her?

A. Between the Sound and 'Frisco.

XQ. 125. Between the Sound and 'Frisco?

(Deposition of George Thomas Cainan.)

A. Yes, sir.

XQ. 126. How many days was the "Sophie Christenson" discharging there all together?

A. I couldn't tell that exactly, how many days.

XQ. 127. Give it to us as near as you can.

A. Twelve days.

XQ. 128. How many days had she been discharging when this accident happened? A. One day.

XQ. 129. Only one day? A. Yes, sir.

XQ. 130. And she was discharging eleven days after that? A. About that.

XQ. 131. Were they discharging from the hold at this time?

A. No; discharging from the deck. [56]

XQ. 132. Only the deck?

A. Only the deck.

XQ. 133. About how many pieces were there in this slingload that spilled?

A. How many pieces spilled?

XQ. 134. How many were there in the slingload itself? A. About eight to ten.

XQ. 135. All long pieces?

A. They were about 20 feet long.

XQ. 136. And nearly all of them spilled out into the water, did they not? A. All but three.

XQ. 137. And those three hung a bit, did they?

A. No; they kind of came down last?

XQ. 138. The sling itself did not break, did it?

A. No, the sling itself did not break.

XQ. 139. Nothing at all broke about the machinery anywhere? A. No, nothing at all.

(Deposition of George Thomas Cainan.)

XQ. 140. All that happened was that the lumber came out of the sling; is that right?

A. The lumber came out of the sling.

Redirect Examination.

Mr. HENGSTLER.—ReDQ. *L.* Who was in command of the schooner at the time this work was going on, Mr. Cainan? I mean who was in charge of the work?

A. The mate was in charge of the work.

ReDQ. 2. He superintended it, did he?

A. Yes, sir.

ReDQ. 3. The work was going on according to his directions, was it not? A. Yes, sir.

ReDQ. 4. Who directed you with regard to what slings you used in this case?

A. No one directed, because we know ourselves. The slings when thrown from the wharf went to the ship.

ReDQ. 5. And you used the slings which were thrown from the wharf on to the ship?

A. Thrown from the wharf.

ReDQ. 6. Who would give directions with regard to the gear and tackle to be used in discharging?

A. The mate looked out for that. [57]

ReDQ. 7. Mr. Cainan, you will go on a voyage from here as soon as you find a ship, will you not?

Mr. FRANK.—I object to that as leading.

A. Yes, sir.

Mr. HENGSTLER.—ReDQ. 8. Are you looking for a ship now?

Mr. FRANK.—I object to that as also leading.

(Deposition of George Thomas Cainan.)

A. Yes, sir.

Mr. HENGSTLER.—ReDQ. 9. When do you intend to leave this port, Mr. Cainan?

A. As soon as possible. I am only waiting for this thing to be over, and I am going.

ReDQ. 10. Have you any ship in view now?

A. No, sir. I never look for a certain ship. The first one that comes I take that satisfies me.

Recross-examination.

Mr. FRANK.—ReXQ.1. How long have you been staying here waiting for this?

A. I just came ashore from the "Vidette" last Friday night.

ReXQ. 2. You have been waiting for this since then?

A. No, I only took a few days off, when I leave on a ship.

ReXQ. 3. At present you have no particular ship to go in? You have no particular ship, and don't know just what you are going to do?

A. No, sir. Shipping is pretty fair, and I intend to ship now while shipping is good.

Further Redirect Examination.

Mr. HENGSTLER.—ReDQ. 11. Do you mean to say you do not know what to do now—you do not mean that?

A. I don't know what to do—what do you mean?

ReDQ. 12. What do you intend to do after you are through here?

A. I intend to go to sea right away. [58]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, James P. Brown, a United States Commissioner for the Northern District of California, do hereby certify:

That the reason for taking the foregoing deposition in the cause in the caption of the said deposition named is that the witness George Thomas Cainan, as stated in said notice, is bound on a voyage to sea.

I further certify that on the 18th day of July, in the year one thousand nine hundred and five, at 9:30 o'clock A. M. of said day, I was attended by L. T. Hengstler, Esq., of the firm of Messrs. Andros & Hengstler, proctor for the libelants, and by Nathan H. Frank, Esq., of the firm of Messrs. Frank & Mansfield, proctor for the claimants, and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition was, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Louis Seidenberg, and afterwards reduced to typewriting; that the reading over and signing of the said deposition by the witness was, by the aforesaid stipulation, expressly waived.

I further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of

California, the Court for which the same was taken.

And I further certify that I am not of counsel, nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In Testimony Whereof, I have hereunto subscribed my hand, at my office in the City and County of San Francisco, State of California, this —— day of July, 1905.

JAS. P. BROWN,

United States Commissioner Northern District of California, at San Francisco. [59]

[Endorsed]: Filed Jul. 31, 1905. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk. [60]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

IN ADMIRALTY.

DAVID JAMES FLYNN et al.,

Libelants,

vs.

E. A. CHRISTENSON et al.,

Defendants.

Notice of Taking Deposition of August Ehlert.

To Messrs. Frank & Mansfield, Proctors for Defendants.

You are hereby notified that August Ehlert will be

examined, *de bene esse,* in the above-entitled cause, on behalf of the libelants, before James P. Brown, Esquire, United States Commissioner for the Northern District of California, at San Francisco, on the 8th day of August, A. D. 1905, at 11 o'clock A. M., at the office of Messrs. Andros & Hengstler, room No. 6, in the building situated on the northeast corner of Sansome and Halleck Streets, and numbered 320 on Sansome Street, in the City of San Francisco, in the District aforesaid; and you are hereby further notified to then and there appear and propound such questions to said witness as you may deem fit.

The cause for taking the deposition of the above-named witness is that he is bound on a voyage to sea.

Yours, etc.,

ANDROS & HENGSTLER,

Proctors for Libelants.

San Francisco, August 7th, 1905. [61]

In the District Court of the United States, in and for the Northern District of California.

No. 13,310—IN ADMIRALTY.

DAVID JAMES FLYNN et al.,

Libelants,

vs.

E. A. CHRISTENSON et al.,

Respondents.

Deposition of August Ehlert, for Libelants.

BE IT REMEMBERED: That on Tuesday, August 8, 1905, pursuant to the notice and stipulation hereunto annexed, at the office of Messrs. Andros

(Deposition of August Ehlert.)

& Hengstler, Room No. 6, 320 Sansome Street, in the City and County of San Francisco, State of California, personally appeared before me, James P. Brown, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., August Ehlert, a witness produced on behalf of the libelants in the above-entitled matter.

L. T. Hengstler, Esq., of the firm of Messrs. Andros & Hengstler, appeared as proctor for the libellants, and Nathan H. Frank, Esq., of the firm of Messrs. Frank & Mansfield, appeared as proctor for the respondents.

And the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did thereupon depose and say as is hereinafter fully set forth. [62]

It is hereby stipulated and agreed that the testimony of August Ehlert may be taken in shorthand by Clement Bennett and thereafter put into typewriting, and the reading over and signing of said testimony by the witness is hereby waived.

All other rights under the notice for taking said deposition are reserved.

ANDROS, HENGSTLER, HUMPHREYS,
Proctors for the Libelants.
FRANK and MANSFIELD,
Proctors for the Respondents. [63]

(Deposition of August Ehlert.)

AUGUST EHLERT, called for the libelants, sworn.

Mr. HENGSTLER.—Q. 1. How old are you, Mr. Ehlert? A. Fifty-five.

Q. 2. What is your occupation? A. Seaman.

Q. 3. How long have you been a seaman?

A. I went to sea in *1865*.

Q. 4. And have followed that occupation ever since? A. Yes, sir.

Q. 5. What experience, if any, have you in the lumber trade along this coast, and lumber vessels?

A. In the last 18 years.

Q. 6. What vessel were you on in August, 1903?

A. "The Sophie Christenson."

Q. 7. Whereabouts was she during that month?

A. She laid at San Pedro, alongside the wharf.

Q. 8. In what work was she engaged? A. Discharging lumber.

Q. 9. Do you remember anything particular that happened on August 3, 1903, on the "Sophie Christenson"? A. Yes, sir.

Q. 10. What happened?

A. There was a man killed by the lumber falling on him.

Q. 11. What was his name? A. James Flynn.

Q. 12. Was that during the discharge of the vessel?

A. Yes, sir, during the discharge of the vessel.

Q. 13. Who was in charge of the work at the time?

A. The chief officer.

Q. 14. Do you remember his name, Mr. Ehlert?

(Deposition of August Ehlert.)

A. I think his name was Tom Anderson. His first name was Tom. I don't remember the other name. I think it was Anderson. We always called him Tom.

Q. 15. How was the unloading done—by hand or otherwise?

A. It was hoisted up by a steam donkey.

Q. 16. Hoisted up on what, and how?

A. By a donkey-fall.

Q. 17. From where was it hoisted?

A. From the deck.

Q. 18. And where was it taken to?

A. To the wharf. [64]

Q. 19. Will you tell us just how the lumber was fastened when it was hoisted up?

A. Yes, sir; we had a rope with an eye on each end. We make up a slingload 24 by 24, then take the end, take one end and reeve through the other end, as it were, and hoist it up.

Q. 20. How many times did that rope go around?

A. That rope was too short. That did not go around only once. By rights, it ought to go around twice—a round turn around the load it ought to be, but that rope was so that I could not make it.

Q. 21. What part of the vessel were you working on? A. I was at work on the starboard side.

Q. 22. Which side of the vessel was lying alongside of the wharf? A. The port side.

Q. 23. Was anybody else working on your side, on the starboard side? A. Yes, sir.

Q. 24. Who?

A. A young fellow named Kenyon.

(Deposition of August Ehlert.)

Q. 25. How many of you did it take to make up a slingload? A. Two men.

Q. 26. Were you and Kenyon mates in making up a slingload? A. Yes, sir.

Q. 27. How many loads were being made up—how many slings?

A. Three. There were three gangs running.

Q. 28. Whereabouts was the other gang?

A. Flynn was on the port side.

Q. 29. Who was his mate, do you remember?

A. I forget his name—a young man named Soderchrist, I think was his name.

Q. 30. Where was the other set of men who were making up slingloads?

A. I think they were in the hold on the starboard [65] side, making up a load.

Q. 31. By whom were the slings provided which you used in making the loads? A. The captain.

Q. 32. Did he hand them to you personally?

Mr. FRANK.—I object to that as leading.

Mr. HENGSTLER.—Q. 33. How do you know they were provided by the captain?

A. Because the mate told me, when they were making the slings, he told the captain that they were too short.

Mr. FRANK.—I move to strike that out as incompetent, immaterial and hearsay.

Mr. HENGSTLER.—Q. 34. How long had the work of discharging been going on before the accident happened, if you remember?

A. As near as I can think, about four days; three

(Deposition of August Ehlert.)

days and a half or four days. I cannot say exactly because we had a good deal of lumber off.

Q. 35. Do you mean it was three and a half days before the accident happened?

A. Before the accident happened.

Q. 36. What time of the day did it happen?

A. A little after 8 o'clock in the morning.

Q. 37. Now, had you been working on lumber vessels before in discharging lumber? A. Yes, sir.

Q. 38. And was the way which you followed here by means of the sling which you described the usual way in your experience?

Mr. FRANK.—I object to that as being leading.

A. No, sir, it was not the usual way.

Mr. HENGSTLER.—Q. 39. What is the usual way?

A. The usual way is to take a round turn round the lumber with the sling.

Q. 40. Will you describe what you mean by "a round turn" as distinguished from the way that you fixed it this time?

A. I can describe that by a piece of paper, or a rope, or [66] anything of that description.

Q. 41. I will give you a piece of paper. Do you want to draw it? A. Yes, sir.

(The witness draws a diagram.)

A. (Continuing.) This is the way we had it, and this is the way it ought to be. (Pointing.)

Q. 42. I will mark this first "A." You say "A" represents the way you had it? A. Yes, sir.

Q. 43. I will mark the other "B."

(Deposition of August Ehlert.)

A. That is the way it ought to be.

Q. 44. "B" is the way it ought to be?

A. There is a round turn round the lumber that jams the lumber better. It always leaves a space like that, that space here (pointing). That is where the lumber falls out.

Q. 45. Pointing to figure "A" and drawing a straight line across the loop in figure "A."

A. This jams it together right round (marking the inner smaller circle in "B").

Q. 46. What contrivance is there used, or was there used at that time, for the purpose of making the load swing out on the wharf?

A. There was no contrivance for the purpose of making the load swing out on the wharf. The gaff went back and forward to suit itself.

Q. 47. After the load had swung out on the wharf, was there any machinery or contrivance to keep it out over the wharf and prevent it from swinging back on board the ship? A. No, sir.

Q. 48. Now, did you witness the accident, Mr. Ehlert? A. Yes, sir.

Q. 49. Describe to us as well as you remember it just how it happened. [67]

A. Well, the load went up—I hooked it on on this—the load went up, and the mate always gives the order. The mate says, "Go ahead." He gives one whistle, which means "Go ahead." When he thinks it is high enough, he gives another whistle to stop. Then he sings out "Come back." When the load swings towards the wharf, he sings out "Come back."

(Deposition of August Ehlert.)

Q. 50. Go on and tell us how it happened with this particular load.

A. The mate sang out "Go ahead." He sang out "Hi." He sang out "Come back." When the load came back, it hit the stringer on the wharf because the ship was lower than the stringer, about 2 feet lower than the stringer, and it shook it, and half of it fell out between the ship's side. There were three planks left, and the gaff swung inside because there was nothing to hold it on the wharf. The gaff swung in, and the planks, what was left, fell between the ship's side and the wharf; three planks were left and they swung in and killed him. It was the second time, you know.

Q. 51. Did you notice if these planks touched the other man?

A. Yes, sir; they hit the other man, too; spanked him here (illustrating).

Q. 52. Hit him on the arm?

A. Yes, sir; hit him on the arm kind of *flanting*. It did not hurt him any.

Q. 53. On other vessels that you have been working in discharging lumber, has there been any contrivance for the purpose of keeping the lumber out on the wharf and keeping it from swinging back on the boat again?

A. Yes, sir; I have been in vessels where there has been a guy on the wharf, and one man stands on the wharf and holds it ashore, so that it cannot swing back. I was in the schooner "Comet" that way. [68]

(Deposition of August Ehlert.)

Q. 54. Which way does it take longer, as far as time is concerned, the way the unloading was done in this vessel or the way you have described its being done on other vessels? Does it make any difference in the length of time that it takes?

A. No, sir; it would not make much difference in the length of time when you can hold the gaff on the wharf.

Q. 55. How about making the slingload—would it take longer to make it the proper way as you have described it?

A. That would take a little longer, yes, to make it this way (pointing to the diagram). Of course, you have got to take a round turn with this. It takes a little longer, but not much.

Q. 56. Before this accident happened, did you complain to any of the officers of the ship with regard to the sling that they were using?

Mr. FRANK.—Now, I make objection to that, first that it is leading, and second that it is incompetent and immaterial.

A. Yes, sir, I did.

Mr. HENGSTLER.—Q. 57. To whom?

A. To the mate.

Mr. FRANK.—This is subject to the same objection.

A. (Continuing.) There was lumber fell out the day before. I told him that somebody would get killed here yet with the slings. "Oh," he said, "there are a lots more of Dutchmen." They killed an Irishman for a change.

(Deposition of August Ehlert.)

Mr. HENGSTLER.—Q. 58. Have you known of any vessels that you have been working on that used different material for slings from the material which you have described?

Mr. FRANK.—I object to the question as incompetent, immaterial and irrelevant.

A. Yes, sir. [69]

Mr. HENGSTLER.—Q. 59. What material?

A. Chains.

Q. 59. What, in your experience, is the safest sling?

Mr. FRANK.—Objected to as incompetent, irrelevant and immaterial.

A. The chain sling is the safest.

Mr. HENGSTLER.—Q. 60. Why?

A. In the first place, it is strong, and doesn't break; in the second place, it jams the lumber up better.

Mr. HENGSTLER.—Q. 61. What is the custom—what kind of a chain is used customarily on lumber vessels as far as your experience goes? What is the customary way of unloading, by chain slings or by rope slings?

A. I have been unloading with chain slings and been unloading with rope slings, but rope slings go quicker—there is quicker work with them. You have always got to wait for a chain sling because there is only one. You have got to wait until it comes back and make up your load. There is always a little time lost.

Q. 62. In using rope, the custom is not to wait?

A. No, sir, because there are lots of rope, and you

(Deposition of August Ehlert.)

take up your load. When the hook comes back you hook on.

Q. 63. Did you notice what kind of slings were used on this vessel after the accident?

Mr. FRANK.—I object to the question as immaterial.

A. Yes, sir; the next day we used chain slings.

Mr. HENGSTLER.—Q. 64. Do you know whether the captain was present at the time—did you see him around?

A. No, sir, he was not. He came around from aft after the accident happened.

Q. 65. Had he been around the previous day, or at any time previous, while the unloading was going on, and seen the way that the unloading was being done?

A. Oh, yes, he was there all the time. [70]

Q. 66. And during the time when the vessel was being unloaded up to the time of the accident, what kind of slings were used? A. Them rope slings.

Q. 67. The short ones that you have described?

A. The short ones that I have described.

Q. 68. Did they at any time use any slings that you could have made a round turn with twice?

A. No, sir.

Q. 69. Are you looking for a vessel now, Mr. Ehlert? A. Yes, sir.

Q. 70. You are about to go on a voyage to sea?

A. Yes, sir.

Cross-examination.

Mr. FRANK.—XQ. 1. Mr. Ehlert, when do you expect to go to sea?

(Deposition of August Ehlert.)

A. Any time I can get a chance.

XQ. 2. Then you have no vessel now?

A. Not at the present, now.

XQ. 3. You are just on the front, and if you can get a vessel you will go to sea? A. Yes, sir.

XQ. 4. What was the last vessel that you were in?

A. The barkentine "Fullerton."

XQ. 5. Where did she go from?

A. We went from Port Hartford to Honolulu, Honolulu to Port Harford, and Port Harford back here. I left here in "Port Costa."

XQ. 6. She is an oil ship? A. Yes, sir.

XQ. 7. How long was it that you were in her?

A. Nearly two months—fifty-seven days.

XQ. 8. Before that what vessel were you in?

A. I was in the "Mary E. Foster."

XQ. 9. Where did she go from?

A. She came from Honolulu.

XQ. 10. From Honolulu to where?

A. From Honolulu to La Haina, and from there to San Francisco.

XQ. 11. That was a sugar vessel?

A. A sugar vessel, yes. [71]

XQ. 12. How long were you in her?

A. About five weeks somewhere.

XQ. 13. And previous to that what vessel were you in? A. In the "Marsden."

XQ. 14. Also in the Honolulu trade?

A. No, sir; it went to Hilo.

XQ. 15. Also carrying sugar? A. Yes, sir.

XQ. 16. How long were you in her?

(Deposition of August Ehlert.)

A. Nearly two months in her.

XQ. 17. Previous to that?

A. I was in a vessel called the "Gardner City."

XQ. 18. Where did she run?

A. She came from Tacoma to San Francisco, load and discharge there.

XQ. 19. Came down empty?

A. No, sir; we loaded in Tacoma and came down here to discharge the lumber.

XQ. 20. From there, where did she go?

A. I left her here at that time.

XQ. 21. Where did she discharge—at the Oakland Wharf? A. At the Sunset Lumber Company.

XQ. 22. When was that—can you give about the date? A. Last October.

XQ. 23. Who was her captain?

A. A captain by the name of—I have forgotten his name. Anyhow, we lost the deckload coming down. I remember that all right.

XQ. 24. Lost your deckload? A. Yes, sir.

XQ. 25. Before that what vessel were you in?

A. I was in the schooner "Alice."

XQ. 26. Where did she run?

A. No—I was in the "Minnie A. Caine."

XQ. 27. Where did she go?

A. She went from San Pedro to Tacoma.

XQ. 28. From San Pedro to Tacoma?

A. And back again to San Pedro—Redondo, in fact. [72]

XQ. 29. Went up empty, I suppose, and came down with a cargo of lumber? A. Yes, sir.

(Deposition of August Ehlert.)

XQ. 30. Had you been with her long, more than that one round trip? A. One round trip.

XQ. 31. Go on and give us the next vessel. I want to see what vessels you have been on.

A. I cannot remember what vessel I was on before that.

XQ. 32. Give me any vessel that you remember that you have been on.

A. I don't keep run of all the vessels that I have been on.

XQ. 33. Give me those that you can keep run of.

A. I was in the "Solano."

XQ. 34. That is a schooner? A. Yes, sir.

XQ. 35. What did she carry?

A. Sugar and lumber.

XQ. 36. Where from—she carried sugar from where? A. From Honolulu.

XQ. 37. And lumber from here down, and sugar back; is that right? A. Yes, sir.

XQ. 38. One trip? A. One trip.

XQ. 39. Any other vessel?

A. I was in the "George C. Perkins."

XQ. 40. She was also in the sugar trade?

A. A lumber vessel.

XQ. 41. Where from?

A. From the Sound to Honolulu and back again.

XQ. 42. One trip?

A. Yes, sir. I was in the "Endeavor"—the schooner "Endeavor."

XQ. 43. Where from?

A. The Sound to Honolulu and back again.

(Deposition of August Ehlert.)

XQ. 44. One trip? A. Two trips in her.

XQ. 45. What did she carry? A. Lumber.

XQ. 46. That is down, and came back empty?

A. Yes, sir, came back empty.

XQ. 47. Any others?

A. I was in the barkentine "Amelia."

XQ. 48. Where from?

A. The Sound to Honolulu and back again. [73]

XQ. 49. Is that the trade that you have been principally in?

A. Yes, sir; and I was in the schooner "Compeer."

XQ. 50. Also from the Sound to Honolulu?

A. No, sir, to Kahului.

XQ. 51. Also go there for sugar?

A. No, sir; went back again to the Sound.

XQ. 52. What did you carry? A. Lumber.

XQ. 53. Are all these vessels vessels that you have been in since you have been in the "Sophie Christenson"?

A. No, sir; I have been in them before. Before I got in the "Sophie Christenson" I was in the schooner "Sonoma." I went to Australia with her.

XQ. 54. What did she carry to Australia?

A. Passengers and general cargo.

XQ. 55. Any more that you can remember?

A. I was in the schooner "Alice."

Mr. HENGSTLER.—You stated that before.

Mr. FRANK.—XQ. 56. From where?

A. To Tacoma.

XQ. 57. To where? A. To here.

(Deposition of August Ehlert.)

XQ 58. That is not the schooner that lost her deck load?

A. No, that is the schooner "Gardner City."

XQ. 59. Any others?

A. That is all I can remember now. I have been in a good many of them, and in the "Lottie Carson," too.

XQ. 60. Does that comprise the substance of your service on the coast?

A. No, sir; that is not half. I cannot remember any more.

XQ. 61. Now, in your service on this coast, has it been generally off shore like this Honolulu and Kahului business—more off shore than coastwise?

A. I sailed between San Pedro a good many times, between San Diego and the Sound, between Honolulu and so on.

XQ. 62. Then you have been engaged in any kind of trade that came along; you have not been confining yourself to the coast trade? [74]

A. That is supposed to be coast trade—Honolulu vessels.

XQ. 63. When you are speaking of coast trade, that is, including Honolulu vessels; is that right?

A. Yes, sir.

XQ. 64. You made up this slingload, didn't you?

A. Yes, sir.

XQ. 65. You did it yourself? A. Yes, sir.

XQ. 66. Kenyon working with you at the time?

A. Yes, sir; he was working with me.

XQ. 67. Did Kenyon go and get the sling to make

(Deposition of August Ehlert.)

the load up with, do you remember?

A. Yes, sir; I believe it was Kenyon who got the sling.

XQ. 68. He brought it to you, and then you two went to work and laid it out.

A. One man stands on each side of the load, the man who has got the sling in his hand puts it underneath and reeves it through the eye.

XQ. 69. Then you make up your load of lumber, that is, you pile it up before you bring your sling to it? A. Yes, sir.

XQ. 70. After you get what you think is a big load enough, you go off and get the sling and put it around and hoist it right away? A. Yes, sir.

XQ. 7. Is that right? A. That is right.

XQ. 72. You did that in this instance?

A. In this instance.

XQ. 73. Do you know what the size—I mean around—of this pile of lumber was that you put the sling around?

A. It was 24 by 24, or 24 by 26; I cannot say exactly. That is the average load that we make with them short slings.

XQ. 74. Are you testifying now from memory of the load, or only because you think that was an average load that you made?

A. I am testifying from memory of the load.

XQ. 75. Do you remember speaking to a man down in San Pedro in last August about this matter, telling him that your slingload was at that time 36 by 36?

A. No, sir; I did not. [75]

(Deposition of August Ehlert.)

XQ. 76. Are you sure you did not tell him?

A. I am sure I did not.

XQ. 77. What did you tell him?

A. I cannot remember speaking to anybody of 36 by 36.

XQ. 78. You cannot remember anything about it?

A. No, sir; I cannot remember that.

XQ. 79. Did you say anything to him at that time about there being too much lumber in the load for the length of the sling?

A. I don't remember that I said anything to anybody about it.

XQ. 80. You don't remember having spoken to anybody about it at all?

A. No, sir; not about the lumber, in San Pedro or any place else.

XQ. 81. You do not recall it; is that right?

Mr. HENGSTLER.—That is what he said.

Mr. FRANK.—I am examining him.

XQ. 82. Is that right? Just read that question to him, Mr. Reporter.

(The Reporter reads the last question as follows: "Q. You do not recall it; is that right?")

A. I don't remember it, no.

XQ. 83. Now, at the time that this slingload was made up, what did you say? Did you notify the mate in any way that you were ready to have it hoisted?

A. Yes, sir; he see it. He says, "Go ahead."

XQ. 84. Now, after he said "Go ahead"—you said he whistled, is that it?

A. Sometimes he whistled; sometimes he says, "Go

(Deposition of August Ehlert.)

ahead." It all depends what strikes him; it is his own business.

XQ. 85. What did you say upon this occasion when this slingload went up? A. He whistled.

XQ. 86. He whistled? A. Yes, sir.

XQ. 87. Did he say anything else?

A. No, sir; he did not say nothing else.

XQ. 88. He did not say anything else?

A. No, sir.

XQ. 89. What did he do when it got up into the air? [76]

A. He whistled again. That means to stop.

XQ. 90. Did he say anything else, then?

A. After the donkey-driver stopped, he said, "Come back."

XQ. 91. Is that all he said?

A. He said, "Come back"; that is what he said.

XQ. 92. Did he say anything else?

A. No more.

XQ. 93. What did he do?

A. Then the load came back and hit the stringer.

XQ. 94. Did he not do anything with sending the load out?

A. He did not do anything to send the load out. It flew out itself.

XQ. 95. Did he not put his hand on it?

A. I did not see him put his hand on it.

XQ. 96. What were you doing at that time, after your load went up in the air—turn around to get another? A. I looked at the load going up.

XQ. 97. After it got up and swung out, when he

(Deposition of August Ehlert.)

said—what is it—"Come home"?

A. "Come back."

XQ. 98. After he did that, what did you do—turn round to go about your business to make up another load? A. No, sir.

XQ. 99. What did you do?

A. The lumber fell out then.

XQ. 100. When did you first see this man during that time, this man that you say got killed?

A. I knew him before that doing longshore work.

XQ. 101. I mean, after your load went up, when did you first see him?

A. When I first saw him after the load was up?

XQ. 102. Yes.

A. He was making up his load on the port side.

XQ. 103. Did you see him making up his load on the port side? A. Yes, sir.

XQ. 104. Was he making up his load when your load was first going up?

A. Yes, sir; he was making up his load then. [77]

XQ. 105. What was he doing?

A. Just standing. He had hold of two timbers like this, and his partner shoved the block underneath the two timbers.

XQ. 106. When was that that he had hold of the two timbers and his partner was shoving, with respect to the time that your load went up?

A. It was just at the time when the load went up and swung back. That was the time that he was right underneath it.

XQ. 107. What else were you going to say?

(Deposition of August Ehlert.)

Mr. HENGSTLER.—He finished.

Mr. FRANK.—Q. 108. What else were you going to say? Did you have anything further to say?

A. I don't know if I want to say anything else.

XQ. 109. Then, as I understand you, you first saw him after the load struck the wharf; is that what you mean?

A. I saw him all the time when I was working there. He was working there all the time. He could not escape my eye when he was as far as from here to there (pointing).

XQ. 110. How far would you call that?

A. About 14 feet, I guess, that is, the distance between me and him. I was on the starboard side of the main hatch, and he was on the port side. I was looking at him all the time.

XQ. 111. Where did you get your lumber from to make up the load? A. The starboard side.

XQ. 111½. Was it lying right there when you picked it up? A. Yes, sir.

XQ. 112. You were not paying attention to something else and looking around to see what somebody else was doing? You were looking at the lumber as you picked it up?

A. When I send up lumber, I always look up at my load, and when it is landed safely on the wharf I go back to my work. [78]

XQ. 113. Is that the custom with all sailors aboard of ship?

A. I don't know what the custom is with other people; I do.

(Deposition of August Ehlert.)

XQ. 114. That is what you do?

A. We are supposed to see the load is right.

XQ. 115. Did you hear anybody call out to stand clear when your load went up?

A. Yes, sir—not when the load went up, but when the load fell. That is the time they sang out to stand clear, but it was too late then.

XQ. 116. It was too late then? A. Yes, sir.

XQ. 117. You are sure no one said to stand clear until the load fell? A. That is right.

XQ. 118. You had a large deckload when you began discharging? A. Yes, sir.

XQ. 119. How far down had you discharged your deckload—pretty nearly finished?

A. I guess we had about 3 feet on the deckload more.

XQ. 120. You were also discharging from the hold at the same time? A. Yes, sir.

XQ. 121. About how deep had you gotten down into the hold?

A. There was a good deal in the wings. We were on each side of the hatch, though. We were about three tiers out each side of the hatch.

XQ. 122. The full length of the ship?

A. Yes, sir, about that.

XQ. 123. This, I understand you to say, was about three and a half or four days that you had been at work so discharging?

A. Yes, sir, about that. I don't keep run exactly. It must have been about four days—something like that.

(Deposition of August Ehlert.)

XQ. 124. During all this time you had been discharging this lumber in the same way?

A. In the same way.

XQ. 125. With the gaff swinging out, and the same slings that you were using?

A. The same slings. [79]

XQ. 126. And the same men were at work?

A. The same men were at work.

XQ. 127. Flynn had been at work just the same as the rest of you?

A. No, sir, he had only been at work about two days and a half.

XQ. 128. Two days and a half he had been doing work?

A. That is all. He was taking the second mate's place. The second mate was supposed to work lumber in those ships. The second mate was made mate.

XQ. 129. And Flynn was working about two days and a half when this accident happened?

A. Two days and a half, longshoreman.

XQ. 130. He was not a member of the crew?

A. No, sir, he was not a member of the crew.

XQ. 131. Did I understand you that some lumber had fallen out the day before, out of the sling?

A. Yes, sir.

XQ. 132. While you folks were all on deck?

A. No, sir, I was in the hold when the lumber fell out.

XQ. 133. You were in the hold?

A. I was working in the hold, on the starboard side.

(Deposition of August Ehlert.)

XQ. 134. How did you know the lumber had fallen out?

A. I know when it fell on top of me. I know when it falls out. It nearly fell on top of me.

XQ. 135. It nearly fell on top of you when you were in the starboard side of the hold?

A. Yes, sir. The lumber flies in all directions.

XQ. 136. How far down were you in the hold at this time?

A. About 5 foot and a half, I guess, or 6 feet; something like that.

XQ. 137. That was the day before?

A. The day before.

XQ. 138. And you were working in the wing, were you? A. Yes, sir.

XQ. 139. About how far over in the wing were you at the time?

A. When this happened I was in the hatch.

XQ. 140. When this happened you were in the hatch?

A. Yes, sir, [80] underneath the hatch coaming, like this (illustrating). This is the hatch coaming, and here I was, about here.

XQ. 141. You had your lumber taken out of the wing, hadn't you? A. Yes, sir.

XQ. 142. About how far out of the wing?

A. I could not say that now.

XQ. 143. Considerable of it?

A. Yes, sir, a good deal.

XQ. 144. Both wings?

(Deposition of August Ehlert.)

A. A little more out on the starboard than on the port.

XQ. 145. Running the full length of the ship?

A. I don't remember that, either—what you call the trunk; some is left aft and some forward.

XQ. 146. Some of you worked aft and some of you forward—what did you say?

A. Some of that lumber is left aft and some forward—in the trunk.

XQ. 147. Everybody on board the ship knew that it had fallen out the day before?

A. I don't know that everybody knew it.

XQ. 148. All the men that were working around there knew it? A. I don't think they did.

XQ. 149. They did not? A. No, sir.

XQ. 150. Why should they not know it?

A. I don't know.

Mr. HENGSTLER.—You do not have to answer that question. I instruct you that is not a proper question.

Mr. FRANK.—I ask you, Mr. Commissioner, whether or not the witness is to answer the question.

Mr. HENGSTLER.—The question, "Why should they not know it?" is not proper.

A. I cannot tell.

The COMMISSIONER.—You have been going along, and the questions that you have objected to have been asked and answered. If it is put in a shape that confuses him, he will make a confusing reply. [81] On its face, the question itself will tell.

Mr. HENGSTLER.—I object simply because it is

(Deposition of August Ehlert.)

a terrible waste of time. How could this man know?

Mr. FRANK.—We will argue that to the Judge. I have a fairly intelligent idea of how to cross-examine the witness, and I have a right to cross-examine him in my own way. I object to any interference by counsel on the other wise, except in a proper and legal manner making such objections as he may have to the testimony to put into the record.

Mr. HENGSTLER.—I appeal to the Commissioner whether it is necessary to go in that way and ask this man what other men knew at the time.

The COMMISSIONER.—I would let the question go, and the answer is accompanied with your objection.

Mr. HENGSTLER.—I object to the question because it is not a fair question and is impossible for this man to answer.

Mr. FRANK.—XQ. 151. You do not know where any other men were working except yourself at that time?

A. Yes, sir, there was a gang working in the after part and a gang in the forward part.

XQ. 152. What hatch were you in?

A. The main hatch.

XQ. 153. There was no gang working about the main hatch? A. I was—me and another fellow.

XQ. 154. You and another fellow were working in the main hatch; is that right?

A. Yes, sir, in the main hatch.

XQ. 155. This other gang were out working in the hatch?

(Deposition of August Ehlert.)

A. They make up their load aft and forward. I make up my load aft.

XQ. 156. Were they making up their load on deck?

A. No, sir, down below.

XQ. 157. The day before everybody was working down below; is that right?

A. Yes, sir, that is right.

XQ. 158. How long had you been working down below—how many days?

A. It must have been about three days and a half, I guess; three [82] days—something like that. I cannot remember that. I don't keep run of that.

XQ. 159. About three days and a half down below?

A. The mate looks after those kind of things, how long we have been working.

XQ. 160. I am trying to get your recollection of it. You are testifying here as to things that you know. I want to get your recollection. About three days and a half you had been working down below before this first time when you say lumber fell out of the sling; is that right?

A. The lumber fell out? This business we have been talking about last now?

XQ. 161. This business that we have been talking about for the last five minutes.

A. You asked how long we were working in the hold?

XQ. 162. Yes.

A. When this particular thing happened?

XQ. 163. You say that the day before some lumber fell out of the sling. You were in the hold, and

(Deposition of August Ehlert.)

everybody else was in the hold; is that right?

A. Yes, sir, that is right.

XQ. 164. How long had you been working in the hold at that time? Do you understand the question?

A. Yes, sir.

XQ. 165. How many days had you been down there? A. I cannot tell.

XQ. 166. Your best recollection.

A. Sometimes you work in the hold, and sometimes you work on deck, you see.

XQ. 167. Now, as a matter of fact,—

A. When you work like that, sometimes you work on deck and sometimes you work in the hold; sometimes one gang works on deck and two in the hold, or two on deck and one in the hold. You cannot keep the run of that after two years.

XQ. 168. Then, as a matter of fact, you don't know whether this other gang was working at the time the lumber fell out the day before? A. Yes, sir. [83]

XQ. 169. Then how do you know it—did you see it? A. I see them, yes.

XQ. 170. You saw them at the time the sling fell?

A. One gang was working aft and one gang forward. I was working on the starboard side by myself, and another fellow.

XQ. 171. Then the cargo was all out sufficiently that you could see clear aft and forward; is that right? A. Yes, sir, I could see that.

XQ. 172. That is the way you saw it?

A. Yes, sir, I can see where the lumber came from,

(Deposition of August Ehlert.)

where the people work. A man would be blind if he could not see that.

XQ. 173. Let us understand each other. What I want to know is whether you saw these other men working in the hold at the time, because the cargo was out so that you could see clear out aft and clear forward.

A. Yes, sir; I saw one gang working aft, and one working forward on the port side. I worked on the starboard side, me and Kenyon.

XQ. 174. Now, will you listen to my question so that I can get an answer to what I am asking now. I am asking you if, on this day before when you say that part of the slingload fell out, and you were working in the hold, you say the other men were working in the hold—one gang aft and one forward?

A. On the port side.

XQ. 175. You could see them while you were in the hold? A. Yes, sir.

XQ. 176. And that was because the cargo between you and them was out of the hold?

A. There was no cargo between me and them.

XQ. 177. It was all out? A. It was all out.

XQ. 178. That is what I want to get at. Had you known this man before this accident?

A. Yes, sir, I knew him by name and by sight, that is all.

XQ. 179. What name did you know him by?

A. Flynn. [84]

XQ. 180. Is that what you knew him by? Where had you met him before then?

(Deposition of August Ehlert.)

A. I met him in saloons and on the wharf—everywhere.

XQ. 181. Did you ever meet him before this particular voyage?

A. Yes, sir, the last trip before he was on board, but he did not work then.

Redirect Examination.

Mr. HENGSTLER.—ReDQ. 1. Now, Mr. Ehlert, the rope that was provided for the making up of the slingload, was it long enough to go around any kind of a load twice or make a round turn?

A. No, sir.

ReDQ. 2. On any load that you could have made up?

A. No, sir, it was not long enough to make a round turn.

ReDQ. 3. Is there a standard length or size of rope so that when the rope is given to you, you can tell how it is to be used in making up a slingload?

A. A standard size? Do you mean the length?

ReDQ. 4. Yes; in other words, when you get a certain rope, do you, having experience in that trade, know how it is to be used, whether it is to be used for a single turn or for a round turn?

A. It is not supposed to be used for a single turn. It is supposed to be long enough for a round turn.

ReDQ. 5. Why did you not use this particular rope for a round turn, this particular rope in this case?

A. Because I could not make the average slingload, and the mate would have kicked right off.

(Deposition of August Ehlert.)

ReDQ. 6. Was the rope long enough to go round a single turn twice?

Mr. FRANK.—I object to the question as leading.

A. Round a single length, round a single plank?

Mr. HENGSTLER.—ReDQ. 7. Round a single plank.

A. We do not send single planks up.

ReDQ. 8. Supposing you had tried to put it round a single plank, would that rope have been long enough to give it a round turn on a single plank?

A. Yes, sir, it would have been long enough for it, [85]

ReDQ. 9. Would it have been long enough to put it round a load with a round turn?

A. Not a proper load, it would not; not the average load that we are making; that we have to make.

ReDQ. 10. Are you required to make an average load?

A. Yes, sir; it has got to be 26 inches high, and 24 wide.

ReDQ. 11. What would happen if you put the rope round the single plank, for instance?

A. The mate would not take it up, and he would tell me to put in more.

ReDQ. 12. When you say that the unloading had been going on a certain length of time before the accident happened, are you sure about that length of time, or are you simply guessing at the time from what you now say?

A. I am simply guessing at it. I am not sure that I know exactly how many hours or days or minutes

(Deposition of August Ehlert.)

we were at work, because we do not keep run of that when we are at work.

ReDQ. 13. The day before, when you stated that some of the planks came out of the sling, you say all the men were working under deck—is that what you said? A. Yes, sir.

ReDQ. 14. Do you mean this: That they were working in the hold all through the day, or simply just happened to be there at the time when the planks came out?

Mr. FRANK.—I object to the question as leading and suggestive,

A. I think all day that time.

Mr. HENGSTLER.—ReDQ. 15. They did not work on the deck that day, you think? A. No, sir.

Recross-examination.

Mr. FRANK.—ReXQ. 1. Mr. Ehlert, did you, during the time you were discharging there at any time, try to make up a slingload smaller than 24 by 26?

A. No, sir, because, if I did, the mate would kick in a minute and tell me to make a bigger load. [86]

ReXQ. 2. You never tried it, did you?

A. The thing is this: To have the load so big so that it can just reeve through and hook.

ReXQ. 3. You never tried to make a smaller load at any time while you were there?

A. I never tried to make a smaller load. I might have one day made it a little smaller, but I could not make it too small so that I could take a round turn with a sling. That would never do.

(Deposition of August Ehlert.)

ReXQ. 4. Nothing happened between you and the mate—you did not try to do it, is that right?

A. Try to do what?

ReXQ. 5. Try to make a smaller load; you never tried to make a smaller load?

A. What do you mean by a "small load"?

ReXQ. 6. Answer my question: Did you or not try to make a smaller load?

A. Once in a while I made a smaller load.

ReXQ. 7. Once in a while you did make a smaller load? A. Yes, sir.

ReXQ. 8. Nothing was said about it, was there?

A. The mate kicked.

ReXQ. 9. The mate kicked?

A. He told me to fill them.

ReXQ. 10. He told you to fill them?

A. Yes, sir.

ReXQ. 11. How often did that happen at that voyage?

A. I could not tell how many times that happened. It happened pretty often.

ReXQ. 12. It did happen pretty often?

A. Yes, sir.

ReXQ. 13. To you.

A. Yes, sir, and to everybody else.

ReXQ. 14. That is, the mate kicked pretty often during that voyage at your making the loads too small; is that right?

A. Making the loads too small?

ReXQ. 15. Yes.

A. Yes, sir, if I make them too small. I could not

(Deposition of August Ehlert.)

make them too small. In the first place, I have got to fill the slingload up.

ReXQ. 16. When did the mate kick? You say that the mate kicked when you made them too small.

A. Yes, sir; once in a while I might have made it six inches apart, and if there was twelve inches apart he would growl right off. [87]

ReXQ. 17. And that happened quite often?

Mr. HENGSTLER.—That is objected to on the ground that he has already said that it did not happen often.

Mr. FRANK.—ReXQ. 18. That happened quite often during the time that you were discharging the cargo did it not?

A. I don't know how many times it happened. It happened once or twice, I suppose.

ReXQ. 19. You only remember once or twice that you made it too small?

A. I cannot tell about once or twice. I did not count the times. Every time I make a load just a little bit smaller, without filling it in as that is described here, he tell me, "Fill your load up, half a load," and so on.

ReXQ. 20. But you don't remember whether it happened five times or six times, do you?

A. No, sir, I can't remember that.

ReXQ. 21. To your best recollection, did it happen five or six times during that time—as often as that?

A. It is impossible for me to tell how often that man had been saying that. The very moment that the slingload is not filled, he says, "Fill your load

up." "Don't send up half a load," or something like that. [88]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, James P. Brown, a United States Commissioner for the Northern District of California, do hereby certify:

That the reason for taking the foregoing deposition in the cause in the caption in the said deposition named is that the witness August Ehlert, as stated in said notice, is bound on a voyage to sea.

I further certify that on the 8th day of August, 1905, at 11 o'clock A. M. of said day, I was attended by L. T. Hengstler, Esq., of the firm of Messrs. Andros & Hengstler, proctor for the libelants, and by Nathan H. Frank, Esq., of the firm of Messrs. Frank & Mansfield, proctor for the respondents, and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition was, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Clement Bennett, and afterwards reduced to typewriting; that the reading over and signing of the said deposition by the witness was, by the aforesaid stipulation expressly waived.

Accompanying the deposition and annexed thereto and forming a part thereof is an exhibit which was drawn and used by the witness in connection therewith and referred to and specified therein.

I further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of California, the court for which the same was taken. [89]

And I further certify that I am not of counsel, nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand, at my office in the City and County of San Francisco, State of California, this —— day of August, 1905.

JAS. P. BROWN.

United States Commissioner, Northern District of California, at San Francisco.

LIB.'S EXH.

[Endorsed]: Filed August 18, 1905. Jas. P. Brown, Clerk. [90]

In the District Court of the United States in and for the Northern District of California.

No. 13,310.

DAVID JAMES FLYNN et al.,

Libelants,

vs.

CHARLES E. SUDDEN et al.,

Respondents.

Deposition of Charles J. Baker, for Libelants.

BE IT REMEMBERED that on Wednesday, the 22d day of October, 1919, pursuant to the notice hereunto attached, at the office of Messrs. Westervelt & Ball, at Room 525 Citizens National Bank Building, in the city and county of Los Angeles, State of California, personally appeared before me me Harry K. Sargent, a Notary Public in and for the County of Los Angeles, State of California, Charles J. Baker, a witness produced on behalf of the libelants in the above-entitled matter.

APPEARANCES:

EVERETT L. BALL, Appeared for Messrs. Andros & Hengstler, as Proctor for the Libelants and

NATHAN H. FRANK, Esq., Appeared as Proctor for the Respondents.

And the witness having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the cause aforesaid, did thereupon depose and say as is hereinafter fully set forth; that said testimony was taken in shorthand by Edna J. Olive, she [91] being first by me duly sworn to truly and correctly record said testimony in shorthand and reduce the same to writing, and said Edna J. Olive took down said testimony in shorthand.

Mr. CHARLES J. BAKER called for libelants. Witness sworn.

(Deposition of Charles J. Baker.)

Direct Examination by Mr. EVERETT L. BALL.

Q. What is your name? A. Charles J. Baker.

Q. What is your business? A. Lumberman.

Q. How long in the lumber business?

A. Twenty-seven years.

Q. During that time you have been continually in that business? A. Nothing else.

Q. What have your duties been confined to during that period of time?

A. You mean from the beginning to now?

Q. Generally—yes. A. I tallied lumber.

Q. You are familiar with the methods used in discharging a cargo of lumber, are you Mr. Baker?

A. Yes, I am.

Q. Where were you working in August, 1903?

A. San Pedro Lumber Yards.

Q. Who were you working for there?

A. For the San Pedro Lumber Company. [92]

Q. Do you remember the occasion of the accident that occurred in San Pedro on or about August 3d, 1903, in which Mr. Flynn was killed?

A. Yes, sir.

Q. Was a vessel discharging at San Pedro at that time on which Mr. Flynn was working?

A. I guess there was—I remember although I was not personally acquainted with Mr. Flynn at the time—many vessels discharging—

Q. Do you remember a vessel by the name of "Sophia Christensen"? A. Yes. sir.

Q. Was lumber being discharged from this vessel. A. Yes, sir.

(Deposition of Charles J. Baker.)

Q. Did you notice the method used for discharging lumber from this vessel?

A. They used rope slings.

Q. What sort of power did they use?

A. Steam.

Q. Donkey-engines? A. Donkey-engines.

Q. What was the character of the lumber being unloaded? A. You mean the size?

Q. Yes.

A. If I remember right they were two by twelves.

Q. That is what is known as mine timber?

A. I could not say if they were mine timber—they were two by twelve—the size not the length—two inches [93] by twelve inches wide.

Q. Do you know the length of the lumber—approximately?

A. Well—all lengths—they ran from ten to twenty-four feet—longer sometimes.

Q. How were the loads made up?

A. They stacked them up—maybe fifteen—maybe twenty—planks, I think—they swung them up, put a sling around them and hoisted them up.

Q. What was the character of the sling used—a rope sling? A. Yes—a rope sling.

Q. How long was the rope sling?

A. I never measured any in my life—I can't tell you approximately—maybe ten or twelve feet long and maybe longer—I don't know how long they are.

Q. How was the rope sling fastened on the lumber, if you recall?

A. That is a pretty hard matter to recall—now

(Deposition of Charles J. Baker.)

remember I am making a sworn statement and it's sixteen years ago—but you wish me to tell—

Q. Yes—what is your best recollection?

A. I think they just took one turn around the stack—one eye through the other—two eyes on the sling.

Mr. FRANK.—I object to the witness stating what he thinks.

Q. What we ask is what is your best recollection?

A. Well, that is the way I remember—it is too long ago to remember.

Q. Your best recollection is that there was just one turn? [94]

A. Best recollection I have.

Q. Now, where were you when this accident took place?

A. Now, that is where you stick me, gentlemen, —you see I am not sure on that,—for safety's sake a fellow must stand away from the deck at least forty feet—the very least calculation—and then you watch them and step back further and they land on the dock and you stand so to give men room to pack it off—that is one mode—and then there are ways they land a load right on to a truck and shove it away back alongside a pile and unload it there—another follows that truck and loads up—and so on.

Q. What method were they using here?

A. I don't know—I don't remember, Mr. Buckley probably can tell you—he was foreman in the yard.

(Deposition of Charles J. Baker.)

Q. Did you see the accident?

A. I could not possibly see it—even if I had followed the load back.

Q. When was it first called to your attention?

A. Well—general commotion, you know.

Q. About what time of day was that?

A. I could not tell that—I don't know whether forenoon or afternoon—not to swear to it—I don't know.

Q. What is your recollection?

A. I have no recollection on that point.

Q. When you heard that an accident had occurred—what did you do?

A. Ran to the edge of the wharf to the vessel to see what was going on. [95]

Q. What did you see?

A. That is a hard one again.

Q. You saw Mr. Flynn?

A. Let me tell you now—I want to be careful about this thing—right close by the hatch, we call it the main hatch, I think it was, I think they took a man and led him back to what the sailors call the poop, the raised part of the hind end of the vessel—where the cabin is, I know the man was hurt.

Q. Did you see him?

A. I think I saw him—yes.

Q. What was he doing when you saw him?

A. They led him back there—I think two men had hold of him and led him back to the poop deck.

Q. They led him back?

(Deposition of Charles J. Baker.)

A. Yes—had hold of him—sat him back there on the raised part of the poop deck.

Q. Did you notice anything about the character of his wounds?

A. No, I did not go on board the vessel.

Q. Did you hear the conversation while he was talking? A. I heard nothing said.

Q. Anything said about the character of slings used? A. Not that I know of.

Q. Did any of the workmen say anything to you about the character of the slings used?

Mr. FRANK—Objection—Mr. Ball, that is incompetent—hearsay. [96]

Q. Did anyone to your knowledge make any objection to the captain or the mate of the ship—I will change that. Did you hear any member of the crew make any objection to the character of the rope sling used in the unloading of this lumber?

Mr. FRANK.—Same objection—immaterial—and calling for hearsay.

A. I don't remember hearing anything.

Q. Did you ever make any statement to that effect?

Mr. FRANK.—I object to that.

A. I could not recall that—I do not know.

Q. What were the character of the slings used after the accident?

Mr. FRANK.—Also objected to on the grounds that it is immaterial.

A. I don't know as they made any change.

Q. Is it not a fact that they used chain slings?

Mr. FRANK.—I object to that.

(Deposition of Charles J. Baker.)

A. I don't know.

Q. Did you hear any statements made at the time as to how the accident occurred?

Mr. FRANK.—Same objection—immaterial.

A. I will say, Mr. Ball, everybody was talking at the time.

Q. I want you to state what conversation you heard immediately after the accident.

A. Don't remember a word about it. [97]

Q. Don't remember anything about what was said at the time? A. No.

Q. Did anyone tell you that a man was hurt?

A. I knew that—I found that out myself.

Q. Did anyone state how it occurred?

A. No—I don't think I had to ask because I imagined that part of it.

Q. Did you see any pieces of lumber lying on the ship that struck this man? A. Yes, I did.

Q. How did you know they struck him?

A. I did not know that—you asked me if I saw any lumber on the deck.

Q. Did you hear anyone say this man was struck by lumber or not?

A. I would not say I did.

Q. How did you know it?

A. My own imagination—common sense—would tell me.

Q. We want to know how you arrived at the conclusion that this man was struck by a piece of lumber—what is your answer?

A. Under my conclusions nothing else could hurt

(Deposition of Charles J. Baker.)

him—I don't know how to express it—I came to the conclusion.

Q. Is it not a fact that someone told you?

A. I don't know—someone might have—sixteen years ago—I would not know a single man who worked there except the man with me.

Q. You do know that rope slings were used? [98]

A. I know that.

Q. And according to your best recollection one turn taken on the lumber? A. Yes.

Q. What was the character of the ropes—new or old?

A. I would not like to swear to that but I think they were new, possibly.

Q. New—possibly new?

A. Yes—possibly new.

Q. In view of your experience in loading and unloading lumber and your familiarity with the loading and unloading of lumber, do you think the slings used in this case were safe slings?

A. As to their strength?

Q. As to their general qualifications as to holding lumber as to their safety?

A. There is the point—I think in my mind the best way is to take two turns around the load.

Q. What other slings are used—other than rope?

A. Chain and wire slings.

Q. Why do you reach the conclusion that two turns should be taken rather than one turn?

A. It binds the load together and prevents it from slipping.

(Deposition of Charles J. Baker.)

Q. Prevents the pieces of timber from slipping out of the load? A. Yes.

Q. Was any contraption or arrangement made to prevent the load from swinging back on the vessel after it had gotten onto the wharf in this case? [99]

A. I don't remember any.

Q. You are familiar with what they call the Spanish burton?

A. I don't exactly know what you mean—but they sometimes have the rope leading to the fore-rigging that prevents it from swinging back.

Q. They did not have anything of that character in use at the time they were unloading this lumber?

A. I do not remember.

Q. Do you know whether the load did swing back in this case—being unloaded at the time Mr. Flynn was killed?

A. I do not know whether I was in the back or in the front—I am not sure—but I am sure it swung back.

Q. According to your best recollection that's the way it occurred? A. If you please.

Q. According to your best recollection a stick of timber fell from that load as it swung back?

A. That's my impression.

Q. Any timber fall in the water?

A. That is liable to be the case,—my best recollection of it—the slingload came out as usual, you know (gesturing), and some of the timbers fell out and naturally the rope got loose—and the load got lighter—and as the heavy load came out on the boom

(Deposition of Charles J. Baker.)

it balanced the vessel over, and immediately it lightened up the vessel went back again—and three or four planks hanging loosely came down—whether someone told me or whether I saw it—I would not swear as to that. [100]

Q. But you do know that you either saw it yourself at the time or someone told you about it at the time? A. Yes.

Q. Do you remember who you talked to at the time? A. No.

Q. If you were told how this accident occurred you were told immediately after the accident or just at the time it occurred?

A. I suppose I had been told a half a dozen times. You know how it is—when it happens everybody talking and tells what they know and you are liable to hear two or three different stories or more.

Q. Do you know Mr. Butler—foreman in the yard? A. You mean—Buckley?

Q. No—Butler?

A. Mr. Buckley was the foreman in the yard.

Q. In the yard at the time? A. Yes, sir.

Q. Do you know a man by the name of Butler foreman of the yards? A. No.

Q. You may take the witness.

Cross-examination by Mr. FRANK.

Q. Mr. Baker, do you know where Mr. Flynn was at the time this accident happened—on the vessel or on the wharf? A. I know he was on the vessel.

Q. What doing on the vessel—do you know that?

A. Slinging lumber. [101]

(Deposition of Charles J. Baker.)

Q. In other words, he was making up these slings?

A. Making up the loads for the slings.

Q. In other words, it was his duty to put those slings on the load itself? A. Yes.

Q. And that was the duty he was performing at this time?

A. Yes, that was what he was doing at that moment. I know he was working on the vessel as a longshoreman, naturally he was making up sling-loads, that is the only work he could find there in that capacity.

Q. Do you recall how long the vessel had been discharging in that way before the accident happened?

A. No, sir; I could not.

Q. Had much of the cargo been discharged?

A. The deckload was almost all off and I think they were breaking in the hatch.

Q. Do you remember how high a deckload she had at that time?

A. When she started to discharge—to the best of my recollection I think she had a full load on and those deckloads run twelve feet high.

Q. The least calculation—and the full length of the vessel, too? A. Yes, sir.

Q. Do you recall whether they had been discharging one, two or three days?

A. Well—take them at least two—maybe three—days to get that amount of lumber off.

Q. Were you in attendance from the beginning of the discharge [102] of that lumber as tallyman?

A. To the best of my recollection I was.

(Deposition of Charles J. Baker.)

Q. This is the first slingload that slipped—is it not? A. I do not remember of any others.

Q. Had you been alongside many vessels discharging lumber previous to that—rather had you discharged many vessels previous to that?

A. Done nothing else, sir.

Q. Do you know whether or not it was a common practice to discharge lumber in the way this lumber was being discharged? A. You mean—how?

Q. With a rope sling and with a single turn around through the eye on the end of the sling?

A. You want to know if that was a common way?

Q. A common way of doing it at that time?

A. Don't know how to answer that—he was—of course—some vessels do one way—some another—depends on the captain—sometimes the captain has nothing to do with it and it depends on the mate—on second thought—it is the mate's outlook—and the captain has business on shore.

Q. In other words, it is the mate's business to superintend the discharge?

A. Yes, and they always do.

Q. The mate was in charge at this time, was he not? A. Yes.

Q. To get back to the other proposition—I was speaking of—vessels discharge—rather—you have known vessels [103] to discharge during your experience frequently with a sling of this sort?

A. Yes; both ways.

Q. This as well as the other was a common practice?

(Deposition of Charles J. Baker.)

A. I would not say common practice. In my own mind—I do not think it the safest way.

Q. I am not interested in what you think is safe or unsafe, but the question I will ask now is whether or not that was a usual and common mode of discharging lumber?

A. They unload lumber in that way.

Q. That is not exactly an answer to my question, Mr. Baker. Was it usual and common to unload it that way?

A. I am not in that capacity to say—one way was used as often as the other.

Q. They used that way as often as the other?

A. Yes—we took the lumber and as long as nothing happened it was all right.

Q. Your experience and observation, as I understand, is that in the discharge of lumber they used this method as often as they used any other method—is that right?

A. As near as I can say it—I do not know how to answer that accurately—I am not in a position to tell.

Q. Have you any observation on the subject?

A. Sometimes we might not know whether they was a one turn or two turns—we do not pay any attention to that part—we are pretty busy when we tally lumber but when something happens everybody hollers, "You did not do this or you did not do the other thing." [104]

Q. When the slingload comes ashore it comes ashore with the sling round it? A. Yes.

(Deposition of Charles J. Baker.)

Q. And you are standing there and you see it?

A. Yes.

Q. Now, are you not in a position to say whether or not the practice of the sling with one turn is used quite as much as the practice with two turns?

Mr. BALL.—I object to that question in its present form for the reason that you have not identified the character of the lumber—I think if you will make it more specific.

Mr. FRANK.—I am satisfied with the question.

Mr. BALL.—I make the further objection that it is incompetent, irrelevant and immaterial.

A. I am not.

Q. Are you in a position to say that it is not used quite as often as the one with two turns?

A. I am not that sure—have you not many times seen things and the next moment they come out of your mind—I would not like to be obliged to say.

Q. In other words, you would not like to say it is usual or unusual?

A. I do not like to say—I am sworn—and I want to be fair. [105]

Q. However, as far as your experience goes the single turn with a rope sling is frequently and often used in the discharge of cargo?

A. Yes—it is used.

Q. Now, I understood you to say in your direct examination that these slings may be ten or twelve feet long—maybe longer—you do not know?

A. I am not sure.

(Deposition of Charles J. Baker.)

Q. Your impression is that ten feet or twelve feet is the usual length?

A. That's the way it looks to me—I never measured one.

Q. Do you know whether during the entire discharge of that cargo both before the accident and after the accident a Spanish burton was used?

A. I do not remember.

Q. Do you know whether or not any slingload other than this one, if this one did swing back, swung back on to the vessel?

A. You want to know if any other slingloads beside this one that I think swung back?

Q. Yes. A. No, I do not remember.

Q. And as a matter of fact, you don't know whether this one swung back except that you judged that it did?

A. To the best of my recollection I judge it swung back.

Q. You have no recollection on the subject at all, have you, Mr. Baker?

A. I have the outlines. [106]

Q. What do you mean by "have the outlines"?

A. Main facts.

Q. Well, I know, but this is a distinct fact that you should or should not have a recollection of—according as the thing lays in your mind—now—have you a recollection of seeing it swing back at all?

A. No, sir.

Q. You only judge that it may have swung back?

A. Yes, sir.

(Deposition of Charles J. Baker.)

Q. How wide did you say these planks were—twelve inches? A. Twelve inches.

Q. I think that is all.

Redirect Examination by Mr. BALL.

Q. You stated in your cross-examination, Mr. Baker, that you could not say definitely whether or not the method of discharging lumber by a single turn with a rope sling was or was not a common practice.

A. That's what I said.

Mr. FRANK.—I don't think he said that.

Mr. BALL.—I am examining him—you may ask him questions again.

Mr. FRANK.—I think he said it was as common as any other practice.

Redirect Examination Continued by Mr. BALL.

Q. When you are discharging lumber that is two by twelve in dimensions of indeterminate length, can you say that the use of the rope sling with one turn is a common practice?

A. I cannot say that is a common practice. [107]

Q. Have you discharged any lumber in the past week?

A. I have not discharged any lumber for years now.

Q. Have you observed any discharge of lumber in the last week? A. No, sir.

Q. How long has it been?

A. I have not been tallying lumber for a number of years.

(Deposition of Charles J. Baker.)

Q. Would you say that when you were discharging large heavy timbers such as those that were discharged here that the use of the rope sling with a single turn, using a new rope, was a common practice?

A. I don't say it is a common practice—I am no judge—I say they do it one way as often as the other —I am no judge.

Q. You say you are no judge?

A. I don't say one or the other is a common way—one vessel does one way and one does the other—this common practice question is not fair to me as I am in no position to judge—I do not know—I am in no position to say it is a common practice. Of course I would not say it is common or uncommon—I never kept tab on it one way or the other.

Q. But from your experience I understand you to say that you don't consider the use of the single sling is the safe way of discharging lumber?

Mr. FRANK.—We object to his opinion as to whether it is safe or unsafe on the ground that it is unsafe.

A. My candid opinion is that it is not a safe way and if it was my vessel I would make them take two turns. [108]

Q. Your reasons for that are what?

A. I think it is not safe—the lumber is apt to slip out.

Q. You found that opinion on the fact that you have been connected with the discharge of lumber for a great many years?

(Deposition of Charles J. Baker.)

A. Yes, I have had experience in that line—I see things.

Q. You are acquainted with the various methods of discharging lumber?

A. I have seen lots of it.

Q. Now, you testified in your cross-examination that you had no recollection of any lumber having fallen out of this load prior to this slingload—are you sure of that?

A. I don't remember any of that.

Q. Is it not a fact that some lumber fell out of the slingload the day before this accident occurred?

A. I can't tell.

Q. It might have fallen out and you were not in a position to observe it?

A. Yes, it might happen, too.

Q. That's all.

Recross-examination by Mr. FRANK.

Q. I understand you—that in making up these slingloads the mate has charge of the method and determines whether there shall be one or two turns?

A. No, sir. The mate has charge of the vessel during the unloading but whether he will bother his head about how many turns—I don't know. [109]

Q. Would the man himself who was making up the slingload determine that?

A. Somebody would have to.

Q. It's one or the other—the mate or the man who is making up the slingload?

A. One or the other—the mate is the boss at the time.

(Deposition of Charles J. Baker.)

Q. That's all.

Redirect Examination by Mr. BALL.

Q. The mate provided the slings, did he not?

Mr. FRANK.—I object.

Q. Do you know who provided the slings?

A. No.

Q. Would it have been possible to have taken two turns on the slingloads or lumber as discharged from this vessel with slings the length of the slings used in this case?

A. It all depends upon how big the slingload is—I stated fifteen to twenty planks—if fifteen planks thirty inches on each side and one foot across—be five or seven feet—if the sling had been twelve feet long there would not have been enough left to go around once again—but remember I do not know how long the sling was—I don't know.

Q. What is your best recollection?

A. I told you it might be ten or twelve feet long—might be eighteen.

Q. That's all.

Witness excused.

(Signed) CHARLES J. BAKER. [110]

State of California,
County of Los Angeles,—ss.

I, Harry K. Sargent, a notary public in and for said county and state, do hereby certify that the witness Charles J. Baker, in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth and nothing but the truth in said

cause; that said deposition was taken at the time and place named in the annexed notice, to wit: at the office of Messrs. Westervelt & Ball, 525 Citizens National Bank Building, Los Angeles, California, on Wednesday, the 22d day of October, 1919, at ten o'clock of said day; that said deposition was reduced to writing by Edna J. Olive, a disinterested person, in my presence and under my direction; and when completed was by me carefully read to said witness and being by him corrected was by him subscribed in my presence.

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed my official seal this 10th day of November, 1919.

(Signed) HARRY K. SARGENT, [Seal]
Notary Public in and for the County of Los Angeles, State of California. [111]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 13,310.

DAVID JAMES FLYNN et al.,

Libelants,

vs.

CHARLES E. SUDDEN et al.,

Respondents.

Notice of Taking Depositions of J. W. Buckley and Charles Baker.

To Respondents Above Named and to Messrs. Frank and Mansfield, Their Proctors:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that J. W. Buckley and Charles Baker, whose testimony is necessary in the above-entitled cause, and who reside more than one hundred miles from the place of trial of the above-entitled matter, and who are without the Northern District of California, will be examined *de bene esse* as witnesses on behalf of the libelant in this cause before Harry K. Sargent, a notary public in and for the city of Los Angeles, State of California, not being of counsel or attorney to either of the parties above named, nor interested in the event of the cause, at the office of Westervelt and Ball, No. 525 Citizens National Bank Building, Los Angeles, California, on Wednesday, the 22d day of October, 1919, at 10 o'clock A. M. of said day.

Dated: October 8th, 1919.

(Signed) ANDROS & HENGSTLER,
Proctors for Libelant. [112]

Endorsement on back of notice of taking depositions:

Receipt of a copy of the within Notice, etc., is hereby admitted this 8th day of Oct., 1919.

(Signed) NATHAN H. FRANK,
(Signed) IRVING H. FRANK,
(Signed) FRANK & MANSFIELD,
Proctors for Respondent.

[Endorsed]: Filed Jul. 20, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [113]

In the District Court of the United States in and for the Northern District of California.

No. 13,310.

DAVID JAMES FLYNN et al.,

Libelants,

vs.

CHARLES E. SUDDEN et al.,

Respondents.

Deposition of J. W. Buckley, for Libelants.

BE IT REMEMBERED that on Wednesday, the 22d day of October, 1919, pursuant to the notice hereunto attached, at the office of Messrs. Westervelt & Ball, at Room 525 Citizens National Bank Building, in the city and county of Los Angeles, State of California, personally appeared before me, Harry K. Sargent, a notary public in and for the county of Los Angeles, State of California, J. W. BUCKLEY, a witness produced on behalf of the libelants in the above-entitled matter.

APPEARANCES:

EVERETT L. BALL, Appeared for Messrs. Andros & Hengstler, as Proctor for the Libelants, and NATHAN H. FRANK, Esq., Appeared as Proctor for the Respondents.

And the witness having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did

(Deposition of J. W. Buckley.)

thereupon depose and say as is hereinafter fully set forth; that [114] said testimony was taken in shorthand by Edna J. Olive, she being first by me duly sworn to truly and correctly record said testimony in shorthand and reduce the same to writing, and said Edna J. Olive took down said testimony in shorthand.

Mr. J. W. BUCKLEY called for libelants.

Witness sworn.

Direct examination by Mr. BALL.

Q. Your full name is what?

A. John W. Buckley.

Q. Where do you reside? A. San Pedro.

Q. What is your age? A. Fifty-four.

Q. How long have you resided at San Pedro?

A. Since eighty-seven.

Q. What is your business, Mr. Buckley?

A. I am a lumberman.

Q. What were you engaged in during the year 1903?

A. I don't remember that year—but I have been—I was foreman for the San Pedro Lumber Company from eighteen ninety-eight until this year,—nineteen nineteen,—up to the first of June—at that time I was foreman.

Q. Do you remember whether a steamer or schooner by the name of "Sophia Christensen" was unloading lumber about August, nineteen hundred and three at San Pedro? A. Yes, sir.

Q. What were your duties in reference to the unloading of lumber at that time? [115]

(Deposition of J. W. Buckley.)

A. Well, I was general foreman of the yard.

Q. And as general foreman you had charge of the unloading of the lumber, did you?

A. I do not know as you would call that a part of my work at the time I received the lumber.

Q. You had charge of the receiving of the lumber and placing it on the wharf? A. Yes, sir.

Q. You were familiar with the method of discharging lumber at that time? A. Yes, sir.

Q. Will you state just what method was used at that time in discharging the lumber of this vessel.

A. At that time that boat had what we call mining lumber that consisted of two by twelves up to twelve by twelves.

Q. What length?

A. Ran from ten feet to twenty-four feet long.

Q. Now, go ahead and state just how this was unloaded.

A. To get the work done properly—I had them sling the different kinds of lumber separate as much as possible so we could land them on the truck and then take them further out and pass them on to another truck until we got such size loads as were suitable for us to haul away to take to the cars to ship.

Q. You recall the accident that occurred there?

A. Yes, sir.

Q. When a man named Flynn was killed?

A. Yes, sir. [116]

Q. What type of lumber were you loading at that particular time?

A. This slingload that was connected with Mr.

(Deposition of J. W. Buckley.)

Flynn's death was a load of two by twelve.

Q. And do you remember the length?

A. Not exactly. They come assorted—different lengths.

Q. Just how were these loads—slingloads of two by twelve made up?

A. The men on the boat have a short block about two feet long, usually four by four, and the longshoreman—one on each end of the plank, will place it on this block until they get it of sufficient size to put the sling on to it.

Q. How wide would this load be? One plank or two planks wide?

A. It varies usually. Where two by twelves are used usually two would be a fair-sized load—this load in particular I do not remember how wide it was—one tier or two tiers.

Q. According to your best recollection can you say whether the loads of two by twelves were made in two tiers or one tier at that time?

A. If they were making them too small I would criticise them and ask them to make them larger.

Q. Then it is your best recollection that they were two tiers—what is your best recollection?

A. Really, I could not say—I don't want to say when I can't remember that load.

Q. After the loads were made up what was the character of [117] the sling used at this time?

A. A rope sling.

Q. New ropes or old ropes? A. New ropes.

Q. Was one turn taken or two turns?

(Deposition of J. W. Buckley.)

A. One turn.

Q. Was that sling long enough to have made two turns on the size of the piles?

A. In this case they were not.

Q. According to your best recollection what was the length of the slings?

A. They were not long enough to make two turns—I will tell you why I remember that—I saw what they were doing—making one turn—and I asked them to make the second turn or get chain slings.

Q. Who did you ask that?

A. Either—the mate or captain—this is so long ago it has gotten out of my head, but I asked someone there—the mate or the captain—Captain Hansen—

Q. Go ahead.

A. Well, they told me the sling was not long enough—I had them try it and it would not go around the load when they first started—that is—the second turn would not go around the load.

Q. And you did not want to get your men hurt on the wharf?

A. That's what I told the mate or captain.

Q. What did they say?

A. They tried to get it around but it would not reach and [118] then they used one turn.

Q. Did they say why they did not get the chain sling?

A. I do not remember whether they had them or not—I do not know.

Q. About what time of day was it when this accident occurred?

(Deposition of J. W. Buckley.)

A. I can't recall the time of day.

Q. Do you recall about how long the vessel had been discharging lumber prior to the accident?

A. I would judge two days because the boat—the deck was lowered considerable at the time Mr. Flynn was hurt.

Q. Where were you when the accident occurred?

A. On the wharf.

Q. You were in a position where you could see the accident? A. Yes, sir.

Q. Did you see it? A. Yes, sir.

Q. Will you state just how it occurred.

A. This load was taken up by the hoist—as it was being taken up it slipped out of the sling. Mr. Flynn at the time was making a load on one of these blocks about the center of the ship—one or more of these planks hit Mr. Flynn on the head.

Q. Had the load come up to the wharf?

A. Not in my memory.

Q. Had any lumber fallen into the water prior to the accident or was it just immediately following?

A. I cannot say that. [119]

Q. According to your best recollection the load came over?

A. As it was being hoisted some of it fell and struck Mr. Flynn.

Q. About what length of time does it take to hoist a slingload and land it on the wharf and go back for another slingload—approximately?

A. A boat like that at that time was averaging about ten thousand feet an hour.

(Deposition of J. W. Buckley.)

Q. It took three shifts, if I understand, and you had six men unloading—is that right?

A. About that.

Q. And two working together? A. Yes, sir.

Q. These six men, two working together, could make the slingloads just about as fast as they were being unloaded? A. Yes, sir.

Q. Do you know whether or not they would have to wait for the hook to come back after they made the load?

A. The way that work is done—the hook goes round in rotation—the first two men will have their load hooked on—two get the next load and then two the next—most of the time the load is ready for the hook—most of the time,—and if their load is ready they will sit on the load and wait until the hook comes to them.

Q. Do you recollect whether Mr. Flynn's load was the one next to the one being unloaded?

A. No, sir. Mr. Flynn's load was being made up at the time. [120]

Q. What happened immediately after the accident?

A. Myself, the mate and the sailors took him to the —what they call the poop deck—the one where the cabin is—and we sat there a short time and talked—he did not talk rationally although he knew he was hurt.

Q. Mr. Flynn?

A. Yes—and shortly after he was taken home.

Q. Do you remember anything he said?

(Deposition of J. W. Buckley.)

A. I do not—he said—yes—he expressed a desire to go to work, in an offhand way.

Q. Where was he struck by the timber?

A. Some place on the head.

Q. Did you notice whether it made a gash?

A. No, I did not.

Q. Do you know when he died?

A. No—I cannot remember definitely when he died.

Q. You know he did die? A. Yes, sir.

Q. Your experience in discharging lumber covered a great many years, did it not? A. Yes, sir.

Q. And you are very familiar with the methods used in discharging lumber? A. Yes, sir.

Q. From your experience and knowledge of the discharging of lumber from vessels, would you say that the use of new rope with single sling on lumber of the kind being discharged here was a safe and proper way to discharge it? [121]

A. It is not safe—that is—with the one turn.

Q. And you so told the captain or the mate of the vessel? A. Yes, sir.

Q. Do you know whether or not rope slings were used after the accident? A. I could not say.

Q. Do you know whether chains—chain slings were used? A. I could not say that.

Q. Did you remonstrate either with the captain or mate in regard to the sling used?

A. Well—I criticised them, of course, gave them fits.

Q. Did you refer to the fact that you had told

(Deposition of J. W. Buckley.)

them about this? A. Yes, sir.

Q. Do you remember what he said?

A. No, sir—I don't.

Q. You are acquainted with what is commonly known as a Spanish burton?

A. I don't know what that means.

Q. There are certain arrangements which must be made to prevent a load of lumber from swinging back on the vessel after it starts on the wharf, are there not? [122]

A. To prevent it from going back?

Q. Yes—after it has started off the vessel to the wharf—is there any arrangement that can be made to prevent the load from again swinging back onto the vessel? A. I could not answer that.

Q. You don't know of any arrangement that was used in this instance to prevent the load from swinging back?

A. The weight of the load being taken out as it was at that time keeps it on the wharf and when it is released the boom goes back.

Q. If all of the load except two or three pieces were to fall out after it got over on the wharf—or near the wharf—and only two or three pieces remained—that would have a tendency to throw the remaining part of the load back?

A. I think if it was quite light it might go back.

Q. Do you recollect whether or not any timber fell from any loads prior to this load? A. No, sir.

Q. You could not say whether some fell the day before or not? A. No.

(Deposition of J. W. Buckley.)

Q. Do you know of any Mr. Butler who was master of the San Pedro Lumber Company at that time?

A. Master of the San Pedro Lumber Company?

Q. You do not know of anyone?

A. Closest to it is my name—Buckley,—they call me Butler—some of the captains do—you no doubt have reference to me. [123]

Q. Any reference to Mr. Butler as master of the San Pedro Lumber Company would, in your opinion, be in reference to you as you were sometimes called that? A. Yes, sir.

Q. Did Mr. Flynn have his back to the load when it fell, or was he facing it?

A. He was stooping over with his face down loading the lumber on this block at the time, and he could not see it.

Q. By it you mean the slingload above him?

A. Yes.

Q. That's all—you may take the witness.

Cross-examination by Mr. FRANK.

Q. Mr. Butler, was Mr. Flynn working for you at the time? A. No, working for the vessel.

Q. Who was his foreman?

A. The mate or captain usually hired the men on the boat that were doing what they call longshoreman work.

Q. Then really the mate was his foreman at that time? A. Yes, sir.

Q. And he was working now—his part of the work of discharging the vessel—just the same as a member of the crew would be working? A. Yes, sir.

(Deposition of J. W. Buckley.)

Q. In other words—the longshoreman who goes on board to discharge is in the same relation to the mate as a member of the crew is in discharging?

A. That is my opinion. [124]

Q. That is a fact, is it not?

A. He or the captain hires him and he is working for the boat.

Q. And the mate oversees that work?

A. Yes, sir.

Q. Now, when a sling is made up with a single turn it is usually a common practice, is it not, to have a stick and pound the sling down at the end where the rope runs through the eye down onto the load—is it not?

A. Very little unloading is done with one turn around the load.

Q. That is not an answer to my question, Mr. Buckly, when it is done it is the practice to hammer down the end onto the slingload, is it not?

A. Naturally a man would do that.

Q. That is the proper practice, is it not, in order to make it bite on to the load?

A. I do not know as that is the common practice.

Q. Do you know anything about it?

A. To hit it with a stick to tighten it up? I cannot recall of people hammering the sling with a stick because I have seen very little of that.

Q. It would be a proper mode, would it not?

A. It would be a proper thing to do.

Q. And when so done it holds the slingload tight and prevents it from slipping, does it not?

(Deposition of J. W. Buckley.)

A. In my judgment—not with one turn.

Q. Why not?

A. Because there is too little resistance with one turn— [125] even though tightening it with a club.

Q. How many feet from the end of the slingload is the sling usually placed?

A. Well, take as an example, a load that would average sixteen feet—about seven feet from one end.

Q. Then it would have to slip all of seven feet before it would be hoisted? A. Yes, sir.

Q. Now, when it is hammered down on the load, why would not there be sufficient friction to prevent it slipping seven feet?

A. I cannot see my way clear to answer that question because I do not think that hammering the load down has a proper tendency to tighten the load sufficiently.

Q. Now, is it not quite as common to discharge with a rope with a single turn as it is by other means?

A. No, sir.

Q. You mean to say you have never seen it done before or since?

A. Once in a while—it depends on the kind of lumber—you take shingles and lathes and those things—they do it—but in long lumber it is a dangerous move to make to attempt it with a rope sling.

Q. They had, however, been doing that for two or three days before this accident?

A. About two days.

(Deposition of J. W. Buckley.)

Q. And Mr. Flynn had been working there all that time? A. Yes, sir. [126]

Q. He was perfectly familiar with the operation and all that was going on? A. I guess he was.

Q. Had you known him before this occasion—on the front down there? A. Yes, sir.

Q. He had frequently discharged similar lumber?

A. Yes, he had worked on the docks.

Q. In the same capacity?

A. Yes, as a longshoreman.

Q. Now, to whom did you speak—you said to someone—was it the captain or mate?

A. No, sir—I do not know—it was one or the other.

Q. That's all.

Redirect Examination by Mr. BALL.

Q. Do you know who was in charge of the vessel or rather who was in charge of the discharging of lumber from the vessel—what officer was in charge of that work?

A. The mate is always in charge of unloading a vessel.

Q. Do you remember the name of the mate of this vessel? A. No, sir.

Q. This slingload that hit Mr. Flynn was not a load that he made up himself?

A. I would not say that.

Q. If he was making a load at the time and was lifting a plank and had his back to the load—is it likely that it was his load? [127]

Mr. FRANK.—I object to that on the ground that

(Deposition of J. W. Buckley.)

it is argumentative and the Court can draw its own inferences.

Mr. BALL.—I withdraw that question.

Q. After a load was prepared by one of the longshoremen did they watch the load until it reached the dock, or did they immediately proceed to build another load?

A. In this case I do not know what they did, but I can tell you what is customary.

Mr. FRANK.—I object to that.

Q. What is customary?

A. They will see the load leave—they start it toward its destination—then follow their regular work.

Q. According to your best recollection, is that what was done at this time? A. I could not say.

Q. Mr. Flynn was a strong and healthy man—was he not?

A. Yes—I would judge he was about forty-one or forty-two years of age—I would take him for a man of that age at that time—as far as I can remember.

Q. He had not been sick prior to that time?

A. Not that I know of.

Q. He was not injured in any other way than by the blow on the head by this timber falling?

A. That's all I saw.

Q. You don't know of anything else?

A. No, sir.

Witness excused.

(Signed) JOHN W. BUCKLEY. [128]

State of California,
County of Los Angeles,—ss.

I, Harry K. Sargent, a notary public in and for said county and State, do hereby certify that the witness John W. Buckley, in the foregoing deposition named, was by me duly sworn to tstify the truth, the whole truth and nothing but the truth in said cause; that said deposition was taken at the time and place named in the annexed notice, to wit, at the office of Messrs. Westervelt & Ball, 525 Citizens National Bank Building, Los Angeles, California, on Wednesday, the 22d day of October, 1919, at ten o'clock of said day; that said deposition was reduced to writing by Edna J. Olive, a disinterested person, in my presence and under my direction; and when completed was by me carefully read to said witness and being by him corrected was by him subscribed in my presence.

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed my official seal this 10th day of November, 1919.

(Signed) HARRY K. SARGENT, [Seal]
Notary Public in and for the County of Los Angeles, State of California. [129]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

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DAVID JAMES FLYNN et al.,

Libelants,

vs.

CHARLES E. SUDDEN et al.,

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Dated October 8th, 1919.

(Signed) ANDROS & HENGSTLER,
Proctors for Libelant. [130]

(COPY)

Endorsement on back of notice of taking depositions:

Receipt of a copy of the within notice, etc., is hereby admitted this 8th day of Oct., 1919.

(Signed) NATHAN H. FRANK,
(Signed) IRVING H. FRANK,
(Signed) FRANK & MANSFIELD,
Proctors for Respondent.

[Endorsed]: Filed Jul. 20, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [131]

In the District Court of the United States, Northern District of California.

No. 13,310.

HONORA D. FLYNN,

Libelant,

vs.

Schooner "SOPHIE CHRISTENSEN,"

Claimant.

Stipulation re Deposition of Charles R. Woodson.

It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of Charles R. Woodson when written out may be read in evidence by either party on the trial of the case; that all questions as to the notice of the time

and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to the materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived. [132]

In the District Court of the United States, Northern District of California.

HONORA D. FLYNN,

Libelant,

vs.

Schooner "SOPHIE CHRISTENSEN,"

Claimant.

Deposition of Charles R. Woodson, for Libelants.

BE IT REMEMBERED, that pursuant to the notice and stipulation hereunto annexed, and on the 10th day of April, A. D. 1908, at 3 o'clock P. M. of that day, at the office of Messrs. Andros & Hengstler, in the Kohl Building, in the City and County of San Francisco, State of California, before me, Ceda de Zaldo, a notary public in and for said City and County, personally appeared Charles *K.* Woodson, a witness produced on behalf of the libelant in the above-entitled action, now pending in said court, who being by me first duly sworn, was then and there examined and interrogated by Louis Hengstler, Esq., proctor for libelant, and by Nathan H. Frank, Esq.,

(Deposition of Charles R. Woodson.)

proctor for claimant, and said witness testified as follows: [133]

DEPOSITION OF CHARLES R. WOODSON.

Direct Examination.

Mr. HENGSTLER.—What is your full name, Mr. Woodson? A. Charles R. Woodson.

Q. What is your age?

A. My age is twenty-eight.

Q. Your occupation? A. Laborer.

Q. Mr. Woodson, where were you engaged, August 3, 1903?

A. I was engaged in taking lumber from the schooner "Sophie Christensen" to San Pedro lumber-yard, San Pedro, California.

Q. What kind of work were you doing on the schooner at that time?

A. What they call stevedoring work here; there we call it working in the yard.

Q. Had the work something to do with the cargo or the ship?

A. Yes, sir; it was taking it away and sorting it out to go down to the yards.

Q. You were helping in the discharge of the schooner, were you? A. Yes, sir.

Q. What was the cargo of that schooner, Mr. Woodson? A. It was a mining order.

Q. What does that mean?

A. That means timbers two by twelve.

Q. How long had you been working on that schooner in the discharge, from the beginning?

(Deposition of Charles R. Woodson.)

A. Yes, sir; I was one of the first men that went out.

Q. Do you remember the occasion when an accident happened and a man by the name of Flynn was killed in discharging that schooner?

A. Yes, I remember the accident. [134]

Q. How long had you been discharging on that day, about, as near as you can remember?

A. As near as I can remember, it was about three or four days; I would not be certain.

Q. And you had been working on her from the beginning? A. From the beginning; yes, sir.

Q. Whom did you say you were working for?

A. Working for the San Pedro Lumber Company.

Q. Were you on the deck of the schooner during your work, or out on the wharf?

A. I was on the wharf.

Q. What was your part of the work in discharging?

A. Well, my part of the work was taking the lumber from the slingload and starting it out—putting it on trucks to go on the cars.

Q. When the slingloads swung out from the vessels who took the load from the sling, were you one of those? A. Yes, sir; took it from the sling.

Q. What kind of slings were used in the discharge before this accident happened, Mr. Woodson?

A. Used rope slings.

Q. Rope slings? A. Yes, sir.

Q. How long have you been working at that occupation of discharging lumber vessels?

A. I worked at it off and on for three years.

(Deposition of Charles R. Woodson.)

Q. You discharged a good many lumber vessels?

A. Yes; I helped discharge a great many.

Q. Are you familiar with the kind of slings that are used in that work? A. Yes, sir. [135]

Q. What kind of slings are they ordinarily?

A. Well, on timbers they use chain slings mostly, but sometimes they use rope and when they do that they have it long enough to make a round turn on it.

Q. Now, were the slings which were being used in discharging this vessel long enough to make a round turn? A. No, sir; they were not.

Q. How long were they?

A. Why, they were just long enough to go around it once, I should judge, about eight or nine feet.

Q. Go around the load once?

A. Yes, go around the load once.

Q. How did the length of that sling compare with the length of slings ordinarily used, in your experience?

A. Well, they were just—they ought to have been twice as long as they were; they were too short.

Q. Did you notice anything peculiar about the particular sling used when Flynn was killed?

A. I noticed it was a rope sling; that was all.

Q. Was there anything connected with it that made it dangerous besides the shortness of it?

A. Well, they were brand new slings, and of course, it was not as pliable as the others.

Q. Did you continue in the discharge of the vessel after the accident happened? A. Yes, sir.

(Deposition of Charles R. Woodson.)

Q. What kind of slings were used after the accident happened?

Mr. FRANK.—Objected to as immaterial.

A. After the accident we used chain slings. [136]

Mr. HENGSTLER.—Q. Before the accident happened did you think anything about the nature of the sling which was being used?

Mr. FRANK.—That is entirely immaterial, what he thought about it.

A. Why, I thought it was very dangerous and kept out of the way of the loads on account of the slings.

Mr. HENGSTLER.—Q. Did you know the master of the vessel while the discharging was going on, Mr. Woodson? A. The captain?

Q. The captain, yes.

A. Well, I saw him there; yes.

Q. Did you speak to him about the kind of slings and ask him to use different slings?

A. No, sir, I did not, but Mr. Butler did.

Q. Who is Mr. Butler?

A. He is foreman of the yard.

Mr. FRANK.—Q. Did you hear Mr. Butler say it? A. Yes, sir.

Mr. HENGSTLER.—Q. You heard Mr. Butler speak to the master about the slings?

A. Yes, sir.

Q. Mr. Butler was the master of the San Pedro Lumber Company?

A. Superintendent of the yard, yes, sir.

Q. Is he still there?

(Deposition of Charles R. Woodson.)

A. Yes, he was a week ago.

Q. What did he say to the captain?

A. He told him not to use those slings; they were too short.

Q. Did you hear what the captain said in reply?

A. The captain said that is all the slings he had.

Q. Is that all the conversation that you heard between the two?

A. Well, Mr. Butler said, if you want [137] to use rope slings, why to have them longer, splice them together so he could take a round turn; they were very dangerous to use that way.

Q. Did you say anything to the captain after the accident happened, anything with reference to the slings, yourself?

A. Well, some of the men made remarks that they thought they didn't have any chain slings.

Mr. FRANK.—I object to the conversation between these men and the captain subsequent to the accident.

Mr. HENGSTLER.—Do you know whether or not the captain was present when the accident itself happened? A. He was on the boat.

Q. He was on the boat. Do you know whether he was on deck, or whether he saw the accident?

A. No, sir; I do not know.

Q. Who was in charge of the unloading of the vessel at the time, if you know?

A. The first mate.

Q. The first mate. Do you know what his name is? A. No, sir, I do not.

(Deposition of Charles R. Woodson.)

Q. How did this particular rope that produced this accident compare with the other ropes which you have seen in your experience of three years in discharging lumber vessels?

A. Well, the rope was all right, only it was too short.

Q. You say it was half as long as it ordinarily should have been?

A. It was; it should have been twice its length.

Q. You say this cargo was a mining order. What do you mean by that, Mr. Woodson?

A. It was timbers and planks, two by twelve, that go to the mine direct. [138]

Q. Is that larger or smaller than the ordinary lumber? A. It is large lumber.

Q. What is the usual kind of sling used in discharging lumber of that kind?

A. Well, the usual sling is chain.

Mr. HENGSTLER.—That is all.

Cross-examination.

Mr. FRANK.—Q. Did you see the accident, Mr. Woodson?

A. No, sir; I didn't see the accident.

Q. So, as a matter of fact, all you know about this business is that you saw some slingloads come over and that they were using ropes, and you didn't think those ropes were long enough; that is all there is about it?

A. I didn't think the ropes were long enough; no, sir.

(Deposition of Charles R. Woodson.)

Q. Who was present besides yourself when this conversation was held that you have testified to between Butler and the master.

A. Well, I don't remember who all the men were; there were two tallymen and the straw boss, and two gangs.

Q. Where was the conversation held?

A. The conversation was right on the wharf, right there at the side of the vessel.

Q. Right at the side of the vessel? A. Yes, sir.

Q. Do you know where Flynn was at that time?

A. No, sir, but he was on the dock.

Q. He was on the dock right alongside the wharf there, was he?

A. I don't know what part of the dock he was on. [139]

Q. The conversation was held right alongside the stringer?

A. No, sir, not alongside the stringer. As near as I could judge, about 30 or 40 feet; not 30 or 40, but about 20, I should judge.

Q. Held in a loud enough tone for everybody to hear? A. Yes, sir.

Q. A man on the deck of the vessel could hear it as well as you could?

A. Ought to; yes, sir.

Q. Everybody, then, was warned that it was dangerous and they were all keeping out of the way?

A. I was, I don't know that the others were.

Q. Well, they were all warned, weren't they, by that conversation that it was dangerous?

(Deposition of Charles R. Woodson.)

A. They ought to have been.

Q. They ought to have been—everybody?

(No answer.)

Mr. HENGSTLER.—Q. All those that heard the conversation.

Mr. FRANK.—Put your interpretation on it afterwards, Mr. Hengstler.

Q. Was that the first steamer load that was spilled?

A. I wouldn't like to say whether it was or not; I don't recollect.

Q. Might have been more spilled before that spilled?

A. Might have been; I am not posted on that.

Q. Of course, this rope didn't break; all that happened was that the timber slid out, wasn't it?

A. It slid out; yes.

Q. Did you see it?

A. I didn't see it slide out, no, sir; I never saw them when they slid out, no, sir. [140]

Q. You didn't see it on this occasion?

A. No, sir, I did not.

Q. Then you don't know how the accident occurred?

A. No, sir, I don't know just how it occurred.

Mr. FRANK.—That is all.

Mr. HENGSTLER.—Q. Your present intention is to leave town, isn't it, Mr. Woodson?

A. Yes, sir; that is my present intention.

Q. Have you any idea where you are going?

A. No, sir, I have not. I have no definite place

(Deposition of Charles R. Woodson.)

as yet where I am going. I think I will go up to Oregon.

Mr. FRANK.—Q. How long have you been in town?

A. I have been in town one week tonight.

Q. Where did you come from?

A. Came from San Pedro.

Q. Were you sent up specially on this business?

A. No, sir. [141]

State of California,
City and County of San Francisco,—ss.

I, Ceda de Zaldo, a notary public in and for said city and county, do hereby certify: That the witness in the foregoing deposition named Charles R. Woodson was by me first duly sworn to tell the truth, the whole truth and nothing but the truth; that said deposition was then taken at the time and place mentioned in the annexed notice, to wit, at the office of Messrs. Andros & Hengstler, Kohl Building, in the city and county of San Francisco, State of California, on the 10th day of April, A. D. 1908, at the hour of 3 o'clock P. M. of that day; that it was stipulated by counsel for the respective parties that the deposition be taken down in shorthand and thereafter transcribed into longhand, and that said deposition was by me so taken down and transcribed; that the reading and signing of said deposition by the witness was waived by the respective parties hereto; that the foregoing is a full, true and correct transcript of the testimony of the witness and of my shorthand notes.

IN WITNESS WHEREOF, I have hereunto set my hand and seal at my office in the city and county of San Francisco, State of California, this 20th day of April, A. D. 1908.

[Seal] CEDA DE ZALDO,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 20, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [142]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 13,310.

Before Honorable FRANK S. DIETRICH, Judge.

DAVID JAMES FLYNN et al.,
Libelants,

vs.

CHARLES E. SUDDEN et al.,
Respondents.

Testimony.

Monday, April 19, 1920.

Counsel Appearing:

For the Libelants: LOUIS T. HENGSTLER, Esq.

For the Respondents: NATHAN H. FRANK, Esq.

Mr. HENGSTLER.—May it please the Court: This is a case in which the libelant, for herself, and

(Testimony of Mrs. H. W. Flynn.)

as guardian of her minor children, sues for damages for the death of her husband. I will read to your Honor the allegations of the complaint, omitting the formal parts. (Reads.)

The evidence in the case has been taken largely by depositions. I offer in evidence first the deposition of George Cainan. (Reads.)

I offer in evidence the deposition of August Ehlert. (Reads.)

(A recess was here taken until two o'clock P. M.)

AFTERNOON SESSION.

Mr. HENGSTLER.—I now offer in evidence the deposition of [143] Charles K. Woodson. (Reads.)

I now offer in evidence the deposition of Charles A. Baker. (Reads.)

I now offer in evidence the deposition of John W. Buckley. (Reads.)

Testimony of Mrs. H. W. Flynn, for Libelants.

Mrs. H. W. FLYNN, called for the libelants, sworn.

Mr. HENGSTLER.—Q. Mrs. Flynn, you were here this morning and heard the reading of these depositions, were you not? A. Yes, sir.

Q. You are the widow of James Flynn, the man who died on August 3, 1903, are you not?

A. Yes, sir.

Q. How long had you been married at that time?

A. I was married at Redwood City, California, September 23, 1891.

Q. So you had been married about twelve years?

(Testimony of Mrs. H. W. Flynn.)

A. Yes, sir.

Q. The day when this accident happened, where did you reside? A. San Pedro.

Q. Who resided with you at the time?

A. My husband and children.

Q. How many children did you have?

A. Three.

Q. What were their names?

A. David J. Flynn, John L. Flynn and Barbara G. Flynn.

Q. How old was David J. Flynn at that time?

A. He was ten years old, I think. He was born May 28, 1893.

Q. How old was John L. Flynn?

A. He must have been about six; he was born April 25, 1897.

Q. And how old was Barbara G. Flynn?

A. She was five, I think; she was born November 6, 1898. [144]

Q. What was your husband's business?

A. At that time he was doing longshore work, but he usually went to sea as mate when opportunity offered for him to go.

Q. What were his daily wages at the time he worked as a longshoreman?

A. $4 or $4.50 a day, I am not sure which, at that time.

Q. How old was he when he died?

A. Forty-five years old.

Q. How was his health? A. Very good.

Q. Will you tell the Court, if you please, what hap-

(Testimony of Mrs. H. W. Flynn.)

pened with reference to your husband on August 3, 1903, within your own knowledge?

A. The doctor brought him home. He was injured while working on the schooner "Sophie Christensen." The doctor brought him home in the forenoon and put him to bed. The doctor did what he could for him. He told me if there was much trouble to call him. So he fell asleep and he slept until the afternoon, when he was dying. He was groaning in between times. I didn't know that he was dying at the time.

Q. At that time, who furnished you with your daily support? A. My husband.

Q. Had he been doing so ever since you had been married to him? A. Yes, sir.

Q. And who furnished the support for the children? A. He did.

Q. Mrs. Flynn, you were appointed the guardian of your children by the Superior Court of Los Angeles County, were you not? A. Yes, sir.

Q. That was on September 16, 1903?

A. Yes, sir.

Q. And did you act as their guardian after that appointment? A. Yes, sir.

Mr. HENGSTLER.—We have the letters of guardianship here, if it is necessary to produce them.

Mr. FRANK.—They are of age now; they range from 22 to 27 [145] years of age.

Mr. HENGSTLER.—Q. During their minority you acted as their guardian? A. Yes, sir.

(Testimony of Mrs. H. W. Flynn.)

Q. Where have you been residing since your husband's death?

A. In Southern California.

Q. Where were your children residing?

A. They resided with me. I had to work to support them.

Q. Were you working to support your children during the whole period of their minority?

A. Yes, sir.

Q. What kind of a man was Mr. Flynn with reference to steadiness of habits and work?

A. He had steady habits; he always worked every time the opportunity came his way to find employment. He was always ready to work.

Q. You say you supported the children?

A. Yes, sir.

Q. What were you working at?

A. I was working as housekeeper.

Cross-examination.

Mr. FRANK.—Q. You brought them up very nicely, Mrs. Flynn? A. Yes, sir.

Q. They were never in any want at any time?

A. The children?

Q. Yes.

A. Well, under the circumstances I done the best I could on $60 a month; I had to support my father, and three children and myself out of that.

Q. You say your husband was always ready to work; did he find constant employment, or was he working off and on?

A. It was usually very steady for him, because if

(Testimony of Mrs. H. W. Flynn.)

he didn't find employment as a longshoreman there he went to sea as first officer.

Q. He didn't get any $4 a day as first officer, did he?

A. No, not when he went to sea; they had a steady wage for that.

Q. About how much—$60 or $75 a month?

A. At that time I don't know exactly what they were paying; I think they were paying a little more than that at that time. [146]

Q. But somewhere in that neighborhood?

A. Yes, sir.

Q. Did he have anything the matter with either of his eyes? So that you may know what I am after, did he have a glass eye? A. Yes, sir.

Q. He did? A. Yes, sir.

Mr. HENGSTLER.—At this time I would like to ask the Court to take judicial notice of the table of life expectancy in general use among actuaries and life insurers. Is there any objection, Mr. Frank?

Mr. FRANK.—No objection. Let us not waste any time over that.

Mr. HENGSTLER.—There is a particular table called the Farris Table, frequently referred to in the decisions of courts, which shows that the expectancy of life of a man of 45 years of age was, according to one table, 23.82 years—the Carlisle Table; according to the table made by seventeen combined life insurance offices the expectancy is 22.97 years. According to a table called America Experience Table it is 23.80 years. According to what is called the

(Testimony of M. J. Fitzgerald.)

Thirty Offices Experience, a table used by Actuaries, it is 24.09 years.

Libelant rests.

Testimony of M. J. Fitzgerald, for Respondents.

M. J. FITZGERALD, called for the respondents, sworn.

Mr. FRANK.—Before examining this witness, I wish to suggest the death of quite a number of these respondents. It is agreed that these people have died: Charles E. Sudden, owning three sixty-fourths. The purpose of this is that the action abates as to them. Under the maritime law each one is liable only in proportion to his ownership. Henry Brooks; R. Y. Taylor; Robert Sudden; Albert Roe; J. J. Steiger; George Johnson; H. Piltz. [147]

Q. Mr Fitzgerald, what is your business?

A. Superintendent for the American Stevedoring Company.

Q. That company is engaged in what class of business? A. Handling lumber.

Q. Handling lumber? A. Yes, sir.

Q. Exclusively? A. Yes, sir.

Q. How long have you been engaged in that business of discharging lumber? A. About 24 years.

Q. Did I understand you to say you were the superintendent?

A. Superintendent at the present time.

Q. Are you familiar with the methods of discharging lumber from vessels? A. I am.

Q. Assuming that you are discharging lumber of

(Testimony of M. J. Fitzgerald.)

two by twelve, and in lengths from ten to twenty feet, I will ask you whether or not it was, in 1903, usual and customary to discharge such lumber with a rope, single turn?

A. Yes, they use single turn most of the time, a rope sling practically all of the time.

Q. Rope all the time, and single turn most of the time? A. Yes, sir.

Q. Is it still the practice?

A. No, they have gone to wire slings now, chain and wire.

Q. How lately has that been done?

A. For the last seven years. In 1903 they used chains, but very few of them.

Q. Rope slings with a single turn was the usual and customary manner, was it?

A. Well, they used double turns sometimes, too, you know.

Q. Let us get at just what it is; you say they used double turns sometimes too: But did they use single turns also, customarily and usually?

A. They would use single turns and when the load was taken off the block the stevedore would take an iron and jam it down. [148]

Q. He would jam it down with an iron?

A. Yes, sir.

Q. I will ask you in your experience whether it is a common and ordinary experience—I will put it stronger than that, whether it was not an every-day experience in discharging cargoes of lumber, for the

(Testimony of M. J. Fitzgerald.)

lumber to fall out of the sling, no matter what kind of a sling you used?

A. Yes; an every-day occurrence.

Q. What do you use on the wire slings?

A. We use a single turn.

Q. Whether you use a single turn, a double turn, a wire sling, or a chain, I am asking you whether or not that is an ordinary occurrence, no matter what kind of a sling you use?

A. Sure; no matter what we use, it happens every day, lumber falls down.

Q. Has that been constant, in your experience?

A. Yes; whether we are using wire, or chain, or rope, it is an every-day occurrence with us.

Q. It is one of the ordinary risks, isn't it?

A. Yes, one of the ordinary risks.

Q. With regard to a Spanish burton, where lumber is discharged by means of a gaff, was it customary to use a Spanish burton?

A. We didn't use them at all in those days. When a vessel has a donkey we generally use the swinging gaff. The only time we used a Spanish burton was when we would have a donkey on the dock and use our own gaff and put on the burton; when a vessel had a donkey, we generally used the swinging gaff.

Q. Who is it that determines how the sling is placed upon the lumber? Who determines that, whether it is a single or a double turn?

A. The men generally use their own judgment on it.

Mr. HENGSTLER.—I object to that, your Honor,

(Testimony of M. J. Fitzgerald.)

on the ground that it is immaterial and irrelevant, who is to determine it in general. The question is who determined it in this case. [149]

Mr. FRANK.—There is no evidence here that anybody determined it. I am showing what the practice is. It was up to this man to take care of himself; if it was part of his duty, it was up to him to do it.

The COURT.—I will let the answer stand.

Mr. FRANK.—That is all; take the witness.

Cross-examination.

Mr. HENGSTLER.—Q. Where does the American Stevedoring Company do its business—in San Francisco? A. In San Francisco.

Q. What is the address? A. 145 Berry Street.

Q. Are they the stevedores of Messrs. Sudden & Christensen? A. No.

Q. But you have worked for Sudden & Christensen, haven't you?

A. I have worked for all firms, I guess, during my twenty-five years experience.

Q. Answer my question: You have worked for Sudden & Christensen, haven't you?

A. For Sudden & Christensen themselves?

Q. Yes. A. No.

Q. Have you never worked for them as a stevedore? A. Not as a stevedore.

Q. In what capacity?

A. I have been in the stevedore contracting business, and their boats might have packed a few loads for some of our customers.

Q. How long have you been the superintendent

(Testimony of M. J. Fitzgerald.)

of the American Stevedoring Company?

A. About 3½ years.

Q. Who are the officers of the American Stevedoring Company?

A. Ben Reid is the president, and H. J. McPhee is the manager.

Q. How often, in your regular work, do you usually handle the discharge of lumber from vessels?

A. Every day.

Q. Do you work as a stevedore?

A. No, I don't work as a stevedore now. [150]

Q. What is your business now?

A. I am superintendent.

Q. You are in the office?

A. No, I am outside all the time.

Q. By "outside," what do you mean?

A. Around the jobs on the wharves and in the yards.

Q. Do you superintend*ent* the loading and unloading of vessels personally? A. Yes, sir.

Q. You see that it is done right?

A. I see that it is done right.

Q. That is your business now, is it? A. Yes, sir.

Q. How long has it been the custom to use chain slings in the discharge of lumber, and wire slings?

A. Wire slings for the last seven or eight years, I believe; they use a few chain slings. They used practically all rope slings at that time.

Q. The ordinary method now is wire slings?

A. Practically.

Q. That is the universal method now?

(Testimony of M. J. Fitzgerald.)

A. Pretty near.

Q. Are you sure it is not longer back than seven or eight years that that has been the usual method?

A. No, I don't think so.

Q. Which, in your opinion, is the safe method in the discharge of lumber, wire chain slings or rope slings? What is your opinion about that, if you have one?

A. Well, I don't know; I could not say; we figure that one is about as safe as the other.

Q. Which is the most expensive, rope or wire?

Mr. FRANK.—That has nothing to do with this case, your Honor.

The COURT.—Let him answer it.

A. As between the cost of wire and the cost of rope, I guess wire costs a little more. I am not familiar with the prices.

Mr. HENGSTLER.—Q. Why do you suppose it is now the general custom to use wire and chain slings instead of rope slings? What is the reason why the stevedores changed their custom from using rope slings to using wire slings?

A. I guess they use the wire now because they don't wear so quick as the rope. [151] That is the only thing I can see.

Q. Have you ever in your personal experience used rope slings in discharging a lumber vessel?

A. Yes, sir.

Q. Do you apply it yourself as stevedore?

A. No, not as stevedore. In 1903 I got hurt pretty bad myself with a rope sling.

(Testimony of M. J. Fitzgerald.)

Q. In what way?

A. By lumber slipping out of the sling.

Q. What kind of a sling was it?

A. A rope sling.

Q. When was that?

A. In about 1903. I was only married a few months, I know, and I got married in 1902, so it must have been about that time.

Q. What kind of lumber was being discharged when you got hurt? A. 6 by 6.

Q. Much smaller lumber than 2 by 12?

A. No, it is a larger size.

Q. You mean a larger length?

A. No, the dimensions of the lumber.

Q. How do you make that out?

A. 2 by 12, and 6 by 6, 6 by 6 is a little more lumber than 2 by 12, according to the way we figure it.

Q. If lumber was being discharged which varied from 2 by 12 to 12 by 12, would you in those days have used a rope sling?

A. Yes, in those days they were practically using rope slings.

Q. For 12 by 12's? A. Yes, for 12 by 12's.

Q. If you did use a rope sling, would you use one with a single turn?

A. We have done that many a time, used a single turn, but we generally jam it, hit it a couple of cracks in the eye of the sling.

Q. Which is the safer method, to make a round turn or a single turn?

A. I suppose in some cases a round turn is, but

(Testimony of M. J. Fitzgerald.)

in some slingloads it doesn't make any difference. [152]

Q. When does it make a difference?

A. When you have slingloads of flooring.

Q. Suppose it was good rope in both cases, which is the safer method, to make a single turn, or a round turn in discharging large lumber?

A. I figured a single turn was just as safe as a double turn, in my experience.

Q. You do not think it would slip out more easily with a single turn than with a double turn?

A. No, I don't think so.

Q. What kind of a turn did they have at the time you got hurt with that lumber? A. A single turn.

Q. You say that the ordinary method of discharging lumber is by using what they call a swinging gaff? A. Yes, sir.

Q. What directs that gaff out toward the wharf, so that it swings out?

A. They generally take about three or four loads from the offshore side and that puts a little list to it.

Q. That is the only thing that directs it?

A. Yes, sir.

Q. And then it swings out? A. Yes, sir.

Q. And it may easily swing back again?

A. No, not when she has a little list.

Q. But sometimes it does swing back?

A. No, not if she has the proper list.

Q. Suppose some of the load drops out, wouldn't the balance be likely to swing back aboard the ship?

A. No, I don't believe so.

(Testimony of M. J. Fitzgerald.)

Q. You don't believe so? A. No.

Q. But it does happen, doesn't it?

A. I have not seen it happen in my experience; once it goes on the dock it stays there.

Q. It would be very easy to prevent the load from swinging back by attaching some kind of a rope, either to the gaff or to the guy, wouldn't it?

Mr. FRANK.—I object to this examination along this line, your Honor. [153]

Mr. HENGSTLER.—Well, it is along a common-sense line.

Mr. FRANK.—It may be common sense.

The COURT.—The objection is sustained, because it is obvious.

Mr. HENGSTLER.—That is all.

Testimony of R. McDonald, for Respondents.

R. McDONALD, called for the respondents, sworn.

Mr. FRANK.—Q. Mr. McDonald, what is your business? A. Stevedoring on the Front.

Q. How long have you been engaged in that business? A. Over 30 years.

Q. Where?

A. All around the waterfront in San Francisco.

Q. In your stevedoring business, what has been the nature of the cargoes you have had?

A. Practically all lumber.

Q. Where are you employed now?

A. The American Stevedoring Company.

Q. In what capacity? A. Lumber.

Q. In what capacity?

(Testimony of R. McDonald.)

A. Around the steam schooners, foreman.

Q. Foreman? A. Yes, sir.

Q. What have you to say in regard to the practice of slinging large lumber with a rope sling, with a single turn, as far back as 1903?

A. Well, practically in that time I don't think there were any wire slings, and they were practically all rope slings; very few chain slings.

Q. How about a single turn?

A. Sometimes they would put on a single turn, sometimes a double turn, just how the case might be.

Q. When you say "how the case might be," what do you mean?

A. Well, according to the loads, and sometimes it would be up to the men themselves, whether they would put on a single turn or a double turn. If you put a gang of men aboard a ship they are supposed to know their business; lumber will slip out even with two [154] turns as well as one turn.

Q. What has been your experience in regard to its slipping out?

A. I have seen it slip out both ways.

Q. How in regard to its frequency, whether it is an every-day occurrence?

A. Well, I would not say that; it is a common occurrence.

Q. Well known by all those who are engaged in that business? A. That is the idea.

Q. How about the use of a Spanish burton when you have a swinging gaff?

A. I never have used one. I have seen it used on

(Testimony of R. McDonald.)

ships where they didn't have a swinging gaff.

Q. But in the case where they had a swinging gaff, did they use a Spanish burton?

A. No, they never used a Spanish burton.

Cross-examination.

Mr. HENGSTLER.—Q. Mr. McDonald, do you know whether the American Stevedoring Company does the regular stevedoring work for the firm of Sudden & Christensen?

A. Well, I don't know; of course, they do some of it.

Q. They do some of it? A. Yes, sir.

Q. Sometimes, in using a rope sling, you use a single turn and sometimes you use a double turn?

A. Oh, yes, I have seen it used both ways.

Q. Which is the safer and better way?

A. Well, practically, I didn't see much difference in it. I have seen the lumber slip out of the double turns as well as single turns. I have seen it slip out both ways.

Q. Which way do you think it would slip out more easily?

A. Well, of course, it might slip out easily in a single turn, but I never seen any difference in it. Of course, I could not tell that.

Q. Would it make any difference whether the rope is a new rope, or not, so far as the slipping out is concerned? [155]

A. No, I don't consider it would. I don't think it would slip out more easily. I would sooner work around a new rope than an old rope.

(Testimony of R. McDonald.)

Q. If it was a brand new rope, you would not object to it?

A. No, sir, I would sooner work around a brand new rope, it is safer.

Q. Have you ever seen a chain sling used in the discharge of lumber?

A. Yes, I have used them myself.

Q. And a wire sling?

A. Yes—not in those days, though; they use them now.

Q. You mean to say you never saw a wire sling in 1903?

A. No, I don't remember them in those days. We used some chain slings.

Q. Chain slings have been in use for the last twenty or thirty years, haven't they? A. Oh, yes.

Q. Have you ever been hurt by lumber falling upon you? A. No, I have never been hurt.

Redirect Examination.

Mr. FRANK.—Q. In the case of a single turn, what can you say as to the practice among stevedores of driving the sling down tight with a stick of wood?

A. You tighten up the sling before the donkeyman calls the winchman; you generally have a block and you hit the sling down.

Q. What do you call that block?

A. I don't know what you would call it.

Q. When that is done, when the sling is struck with a block so as to drive the hook down, does it spring back, or is it likely to spring back at all?

A. No; the weight is on the load then. The winch-

(Testimony of R. McDonald.)

man goes ahead and the weight is on the load.

Q. And it won't spring back?

A. No. If a man understands his business, he generally puts his sling to one side, in one corner of [156] the load, and when the winchman goes ahead the sling tightens right up in the center of the load.

Q. Explain what you mean by that. Take a square load, for instance, or a load where the corner of the lumber is, do you mean he carries the hook over to the corner of the lumber?

A. Yes, and put your sling right there, and when he goes ahead the end of the sling goes through both loops, and you have one loop right here at the corner, and when he goes ahead, by the time the sling is tightened up it is right in the center of your load.

Q. That makes the single turn just as tight as a double one? A. Yes, just as tight.

Q. Is that the proper way to fasten a single turn?

A. That is the proper way.

Recross-examination.

Mr. HENGSTLER.—Q. Do you ever use a single turn nowadays with rope slings?

A. Well, practically they do, sometimes; there are very few rope slings used nowadays.

Q. With your experience as a stevedore, would you, if you had charge of unloading heavy lumber, timbers varying from 2 by 12 to 12 by 12—

Mr. FRANK.—I don't recall any testimony of 12 by 12's. It was 2 by 12.

Mr. HENGSTLER.—Your Honor will find several

(Testimony of R. McDonald.)

places in the depositions, testimony to the effect that it varied.

Mr. FRANK.—This particular load was 2 by 12.

Mr. HENGSTLER.—This particular load?

Mr. FRANK.—2 by 12 up to 12 by 12 was used in this particular vessel.

Mr. HENGSTLER.—Q. If you had to discharge a vessel that carried heavy mining timber, 2 by 12 up to 12 by 12, and possibly 20 feet long, would you use a rope sling with a single turn to it in [157] discharging it, if you had charge of it?

A. Well, it would be just according to the size of the slingload; some slingloads would be so large that you could not use a rope sling; you take a 12 by 12, a rope sling is just as good as a chain sling; that would be 20 feet long.

Q. Do you mean that? A. Yes, sir.

Q. Don't you think a chain sling has a better grip?

A. No.

Q. Why do you think they discarded all the rope slings and don't use them any more?

A. Because they don't last so long. A wire sling lasts four or five times as long a sa rope sling.

Q. And they are correspondingly more expensive?

A. The wire sling, yes.

The COURT.—Q. How is one of these wire slings made? It is not a straight wire, of course?

A. No, it is not straight wire. They have a hook on one end and a loop on the other, and you put it right around your load and then hook it on the donkey fall.

(Testimony of R. McDonald.)

Q. How is it pliable, so that it grips the bunch of lumber? A. Oh, it is quite pliable.

Q. And you say that is used with a single turn?

A. A single turn all the time.

The COURT.—I don't believe I understand just how a wire could be used for this purpose.

Mr. FRANK.—It is wire rope, your Honor.

Mr. HENGSTLER.—It practically cuts into the lumber.

Mr. FRANK.—I don't think Mr. Hengstler's experience as a longshoreman warrants him in making that statement.

The WITNESS.—You can't use a wire sling on surfaced lumber, it cuts into the lumber; you have to use a rope sling on surfaced lumber.

Mr. HENGSTLER.—So my experience, Mr. Frank, is borne out. [158]

Mr. FRANK.—Yes, you are a better stevedore than I thought you were.

The COURT.—Q. Surfaced lumber would be more apt to slip out than rough lumber?

A. Oh, yes.

Q. How would it be possible for rough lumber to slip out if you took a double turn?

A. Well, I don't know how it is, but it does. Lumber, of course, does not always vary in size.

Q. It would be because it varies in size?

A. Yes, sir.

Mr. HENGSTLER.—Q. Is it not because it varies in size, and because the different sizes don't fit close together? A. That is right.

(Testimony of R. McDonald.)

Q. And the center one may get out of position and may drop out? A. Yes, sir.

The COURT.—Q. Ropes are not used now, except for surfaced lumber?

A. Practically not except for surfaced lumber.

Testimony of A. McPhee, for Respondents.

A. McPHEE, called for the respondents, sworn.

Mr. FRANK.—Q. What is your business?

A. I work at stevedore work.

Q. How long have you been working at that?

A. For 20 years.

Q. And before that?

A. I used to go to sea before that.

Q. You were a sailor? A. Yes, sir.

Q. In your experience as a sailor, have you had any experience on lumber schooners?

A. Yes, I have had some experience here on lumber schooners.

Q. I mean as a sailor.

A. Oh, yes, I have been sailing on them, too.

Q. In your experience as a stevedore, what class of cargoes have you been handling?

A. Lumber, mostly.

Q. What are you doing now?

A. I am working on lumber, now, [159] stevedore work.

Q. In regard to the method of discharging lumber by means of a rope sling, state whether or not, in your experience, as far back as 1903, it was usual and cus-

(Testimony of A. McPhee.)

tomary to discharge lumber with a single turn as well as with a double turn.

A. No, I don't think it was. I always used double turns.

Q. You always used double turns? A. Yes, sir.

Q. And you do still?

A. Yes, sir, I do still. I do it altogether, now.

Q. I understood you to tell me the other day that it was usual to use single as well as double.

A. I never spoke about the turns.

Q. State whether or not it is a matter of almost daily occurrence for lumber to fall out of the sling.

A. Yes, lumber falls out of the slings now, wire slings and chain slings, it falls out of the top; if the load is hooked on so that it comes at an angle of 45, it is liable to slip out?

Q. Now, I am asking you about the double turn. Has it been a matter of common occurrence for it to slip out with double turns, rope slings?

A. It would sometimes slip out of the middle of the turn but not out of the top; a rope sling with a round turn holds the lumber very firm; on a one-turn load, like you have spoken of, on 2 by 12 planking, a round turn with a rope sling could not slip out, if it was at an angle of 45.

Q. It could not slip out?

A. No, not unless the sling would break.

Q. I am asking you about your experience, as to whether or not it is a daily experience for the lumber to slip out. A. It does, yes, sir.

Q. How frequently?

(Testimony of A. McPhee.)

A. Well, you might see it slip out of loads three or four times a day on some vessels; then some days you would not see any—that is, on wire slings that they use now. [160]

Q. I want to know what your experience is as to slipping out when using rope slings.

A. Well, if you give it one turn and you don't get it right by the center, I have seen the whole load slip out of the sling. Take the short loads, they have the loads already made up in the hatches of some vessels, and they have rope slings on already, they have it ready to lift the sling right out, and I have seen those loads, if they tip a little bit when there is one turn and there is a big gap—when the rope slips it is up like that, about a foot from the eye, you have a foot space there, and if that load happens to slip at an angle of 45, or something like that, and it is heavier on one end than on the other, the whole load slips out.

Q. Is it not the usual practice to take a stick and jam it down?

A. Yes, I have done that lots of times, but you can't get it down far enough.

Q. How about placing the sling so that the hook comes at the edge?

A. You have not got any hook on those slings.

Q. On the eye? A. On the eye.

Q. The eye comes at the edge of the plank, and it will turn up, won't it?

A. Yes, that possibly could be done.

(Testimony of A. McPhee.)

Q. I am asking you whether or not it is the practice to do it.

A. I never do it or seen it done. It puts the load on an angle, like. I don't think it is a very good idea. Of course, they are doing away with the rope slings in lumber altogether now, except the redwood lumber, where the wire cuts it too much, then they have to us rope, and where they use a rope they use a hook, a slip hook and one turn.

Q. Mr. McPhee, didn't you tell me two days ago that you agreed perfectly with these other two gentlemen in what they testified to?

A. I said that the lumber will slide at any time, with any kind of sling, from the middle of the load. [161]

Q. With any kind of a sling?

A. Yes, with any kind of a sling, it will slip out of the middle of the load if there are some small sizes in it.

Q. Didn't you tell me that that was your daily experience during the twenty years—almost daily?

A. Yes, sir.

Q. That it happened? A. Yes, sir.

Q. It is one of the ordinary risks you take?

A. Yes, you are looking for it all the time.

Q. You are looking for it all the time?

A. Yes, sir.

Mr. FRANK.—That is all.

Mr. HENGSTLER.—No questions.

Testimony of Hans D. Lungvalt, for Respondents.

HANS D. LUNGVALT, called for the respondents, sworn.

Mr. FRANK.—Q. Captain, you were the master of the schooner "Sophie Christensen" at the time of this accident? A. I was.

Q. Did you see the accident? A. I did.

Q. What happened—tell us how the accident happened.

A. I came along from aft and was going forward, I was going to talk to the steward; I was going to tell him to bring me some breakfast; it was about ten or fifteen minutes after eight o'clock in the morning; when I came forward they were heaving a load up out of the hold, and the load started to slip; there were a couple of planks slipped out of the load; it was a single load, 12 by 12's, and I suppose 20 pieces in it; I seen the pieces start in to slip out, and I said to everybody, "Get out of the way, get out of the way." And everybody was out of the way, all walked away, and the load swung in to the wharf. When it came in to the wharf the donkeyman didn't let it go; he could have let it go, but he kind of held on, and the load swung back and one plank slipped out again and it stood on end; Mr. Flynn, the man that got hurt, had gone back, he was warned to [162] get away and he was away, he was between the poop and the mizzenmast, but he went back again; nobody told him to go back; he went back on his own account, and this plank fell out and hit him

(Testimony of Hans D. Lungvalt.)

on top of the head. I walked over and got hold of the man and picked him up and I took him down into the cabin, and I bathed his head and I gave him a big drink of whiskey. He said to me, "I am able to go to work now." I said, "No, let us go and see the doctor, and if the doctor says you are all right you can come to work right away again." So we went to the doctor. He said to the doctor, "I would like to see you privately." He said, "All right." And they went in the room; they went in another room. The doctor came out after awhile and said, "Do you know what he wants?" I said, "No." He said, "He wanted to tell me he had a glass eye." I said, "He could have told me that right here, because I know that." The doctor said, "The man wants to go to work again." I said, "He is kind of dizzy: I will take him home." That is all I know about it.

Q. Did Mr. Buckley, or anybody else, come to you and make any protest about using a single turn rope?

A. No, sir; no, sir.

Q. How long had you been discharging there when that happened?

A. I believe four and one-half days.

Q. Using the same kind of sling all the time?

A. All the time.

Q. Do you know what the length of those ropes was?

A. I do pretty well; they were over three fathoms, about eighteen feet.

Q. About eighteen feet? A. Yes, sir.

Q. Was that sufficient to have made a double turn

(Testimony of Hans D. Lungvalt.)

if they had seen fit? A. Yes, sir.

Q. Who determined on board the vessel whether they should make a single or double turn?

A. The men do that just about the way they please; if you stood there and told them to put a double turn around they would tell you to go to the hot place.

Q. What can you say about fastening a single turn by the use of a [163] block?

A. Well, a single turn is used a great deal, and mostly, in my experience, because it is all large lumber.

Q. How about driving it down? Is there a practice of driving it down with a block, with a stick of wood?

A. It is not necessary. If you have a load of lumber of that kind, if you put the eye on the side of the sling, you have two eyes generally in the sling, and if you put one in through the other eye and put it on the side of the load it will tighten itself. You don't have to hit it, it is not necessary to hit it. Most of the men when they sling a load of lumber they will put the eye on the side of the load, and when they heave it tight it tightens up itself.

Q. When you fasten it in that way, does it bind the load the same way as a double turn, or does it not?

A. Just as good, with that kind of lumber.

Cross-examination.

Mr. HENGSTLER.—Q. At the time when the "Sophie Christensen" was discharging her lumber,

(Testimony of Hans D. Lungvalt.)

only one turn, a single turn, was used on that lumber?

A. At times they used a double and at times they used a single; it was up to the men to do so.

Q. You mean in the discharge of this particular vessel they sometimes used a double turn?

A. Sometimes they used a double and sometimes a single, according to the load they sent up. If I was sending up a load of large lumber, I would use a single turn. On that kind of lumber, it is not necessary to use a double turn. If you have battens, and small lumber, etc., a round turn is all right to jam the lumber together; but this is not necessary to jam it together with this large lumber. We specially load them; most of them was single turn. This was just one single turn, with about 18 or 20 pieces in it. It was only necessary to put one turn around it. In that kind of a load they will make them single because they can load them so much easier in the truck, and they take the trucks [164] and sort them again, run them over to the cars and pick them up. 10 by 10's is most mining timber. They put about four or six pieces in a load; they never slide out, they jam up together. But with small lumber, 1 by 3, 2 by 4, and such sizes, you generally put a round turn around and jam it up, and even then they will slip out, nearly in every load they will slip out because the lumber is not cut even by the mill, one will jam the other. It is a common occurrence every day for a piece of lumber to fall out. I bet through hurry there is a piece or two of lumber falls out of a

(Testimony of Hans D. Lungvalt.)

sling no matter what method is used.

Q. Don't you think that a rope sling with a single turn is better than a wire sling would be for lumber?

A. Well, I don't know about that. When I was sailing they didn't use wire very much; it was more rope or chain. When I was sailing they didn't use wire much. It is only lately. In the "Sophie Christensen" nobody used wire. Afterwards, when I started to sail again wire was in use, and I have used wire; wire is just the same, lumber will slip out of a wire sling just as well as out of a rope sling, because the lumber is not cut even. Every man generally looks out for the load and looks after it until it is clear or gets landed, and then the men go to work again.

Q. What did you use after the accident happened?

A. I used the same slings as I used before the accident.

Q. Isn't it a fact you used chain slings after the accident?

A. I didn't do any such thing.

Q. If the other witnesses in this case testified that they used chain slings, do you say they didn't tell the truth?

The COURT.—That is argumentative.

A. I don't know what the other witnesses said, but that is what I say. [165]

Mr. HENGSTLER.—Q. Did you see the lumber when it struck Mr. Flynn? A. I did.

(Testimony of Hans D. Lungvalt.)

Q. You stated, did you not, that it came back from the wharf?

A. Yes, it swung off the wharf and a piece fell out; it stood on end this way, and the other end hit Mr. Flynn right in the head.

Mr. HENGSTLER.—If your Honor please, I do not think I have any other questions. I didn't hear a great deal of the direct examination of this witness, and, with your Honor's permission, I would like to have his direct examination read; I might have missed something that might be of some importance.

The COURT.—Very well.

(The record was here read by the reporter.)

Redirect Examination.

Mr. FRANK.—Q. You are not connected with the "Sophie Christensen," or with the owners?

A. No, not at all.

Q. You have been away from her many years?

A. I have not been on the "Sophie Christensen" for about eight years.

Q. And you have no interest in this, whatsoever?

A. No interest whatsoever.

Mr. FRANK.—I offer in evidence the deposition of D. W. Nilsson. (Reads.)

That is the case, your Honor.

The COURT.—We will take an adjournment now until to-morrow morning at ten o'clock.

Tuesday, April 13, 1920.

(Thereupon the cause was argued by the respective counsel, during which the following occurred:)

Mr. FRANK.—It is proper to permit an amendment to the pleading to conform to the testimony. If there is any question of that [166] kind I ask the privilege of making an amendment, if the decree is not in our favor.

Mr. HENGSTLER.—I do not desire to compel you to make an amendment to your answer. I merely mention it to show that the defense of the negligence of fellow-servant is not set up in the answer, and we had no notice upon the matter in making up our case.

The COURT.—I had hoped to be able to render my opinion at the conclusion of the argument, but there is one point of law I desire to look up. I will decide it within two or three days at the outside.

[Endorsed]: Filed Jul. 20, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [167]

In the Southern Division of the United States District Court in and for the Northern District, First Division.

IN ADMIRALTY—No. 13,310.

DAVID JAMES FLYNN and Others,

Libelants,

vs.

E. A. CHRISTENSON and Others,

Respondents.

Memorandum Decision.

April 16, 1920.

DIETRICH, District Judge:—

On the question of the primary negligence of the owners I find that the rope sling was in general use and while the single turn was not unusual the double turn was the more common and was recognized as a safer practice. It is difficult entirely to discredit the statement of libelants' witnesses, especially the testimony of the superintendent of the Lumber Company to the effect that a single turn was regarded as extrahazardous and that protest against its use was made to the officer in charge. It may be admitted that, if carefully adjusted, a single turn will bind quite as closely as a double, a bundle having a certain shape, so long as the rope is taut and there is no shifting of the timbers, but we have only to resort to known physical laws to be persuaded that, generally speaking, the double turn grips more closely and will more quickly adjust itself to changing form. It may be added that one of the witnesses for the respondents quite emphatically testified that the double turn is safer. The mere fact that the single turn was used to some extent is not a sufficient defense. Under the circumstances of the case, due regard for the safety of the workmen demanded the adoption of the safer method. It was the non-delegable duty of the respondents [168] to take reasonable care in providing safe appliances for carrying on the work. The slings in question were long enough only for a single turn, and, being new, were comparatively stiff

and smooth. It is difficult to see how such an accident could have occurred if the double turn had been employed. When the bundle struck the railing of the wharf some of the shorter pieces were shaken out and thus the size of the bundle was reduced. To this smaller bulk, a double turn would necessarily have quickly adjusted itself, whereas the single turn doubtless failed to tighten, and from the partially open loop thus left the other pieces, by one of which the deceased was struck, easily escaped. Upon the whole, it is thought that the failure to provide slings long enough for a double turn constituted negligence.

If it be conceded that the common-law doctrine of assumed risk can be invoked in a case of this character, such a rule, almost universally recognized as operating harshly under modern industrial conditions, should be sparingly applied where the master is negligent and continues to require the use of an inadequate or defective appliance after its insufficiency has been called to his attention. It is to be noted that this defense is not pleaded, and while, without pleading it, a defendant may avail himself of it, if it is established by the plaintiff's own evidence, the evidence relied upon under such circumstances should be reasonably conclusive. Certain answers elicited from libelants' witnesses on cross-examination tend to induce the belief that the deceased was able to appreciate the ordinary dangers incident to his employment and to the use of the single turn. Doubtless short or small pieces of timber sometimes escape from a load whether the single or double turn is used and a workman with any

considerable experience must take knowledge of the danger from that [169] source, but here, as already noted, the long timbers slipped out after the load had reached the wharf railing, a casualty which is not shown by the evidence to be of frequent occurrence.

The real question in this connection is thought to be one of contributory negligence and that defense is put in issue by the pleadings. The general nature of such hazards as are incident to the use of a single turn was well known and injury could be avoided by the exercise of a proper degree of caution. That is, there was but a single peril, the slipping of timbers from the load, and manifestly workmen could protect themselves by standing back when the load began to rise and remaining back or keeping a lookout until it was actually deposited on the wharf. It is not a case where in using an appliance, known by him to be defective, a workman is subjected to a peril which it is impossible for him to escape. The view must be taken that the deceased knew quite as well as his superiors of the kind of perils attending the use of the different forms of slings and it was his duty to exercise care commensurate with the degree of peril. It was possible for him to be on guard until the load swung on to the wharf in harmony with the practice followed by some of his fellow-employees, and realizing, as he must have done, that the timbers were likely to slip out of the load, it was incumbent upon him in the exercise of due care, to keep a lookout until danger was past.

Under the rule prevailing in maritime jurisdic-

tion, where both parties are chargeable with a want of due care and the negligence of neither is wilful or gross, the damages will be apportioned. Clearly neither party in this case was guilty of gross negligence. Accordingly upon consideration of the whole case, I have concluded to divide the damages and to award libelants upon the basis of $10,000.00. [170]

At the trial, counsel for the respondents suggested the death of respondents, Charles E. Sudden, owner of three sixty-fourths (3/64), Henry Brooks one thirty-second (1/32), R. Y. Taylor, one thirty-second (1/32), Robert Sudden five thirty-seconds (5/32), Albert Rowe two thirty-seconds (2/32), J. J. Staiger one thirty-second (1/32), George Johnson one thirty-second (1/32), and H. Pilts one thirty-second (1/32), and the correctness of the statement was not questioned by counsel for the libelants. Admittedly as to them the action has abated, and therefore, in the aggregate the decree can be for only thirty-seven sixty-fourths 37/64 of $10,000.00.

Under the circumstances it is thought that two-thirds of the recovery should go to the widow of the deceased and the other third in equal shares to the three children.

Counsel for the respondents will prepare a decree in harmony with these conclusions.

[Endorsed]: Filed Apr. 16, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [171]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,310.

DAVID JAMES FLYNN et al.,

Libelants,

vs.

E. A. CHRISTENSON et al.,

Respondents.

Memorandum Decision.

ANDROS & HENGSTLER, Proctors for Libelants.

NATHAN H. and IRVING H. FRANK, Proctors for Respondents.

DIETRICH, District Judge.

Upon the request of counsel for both sides, I have without the formality of a petition for rehearing, given consideration to two points not argued upon the original submission.

The first is a contention on the part of the libelants that in the decision it was erroneously assumed that the respondents' liability is several and limited to their respective interests in the schooner. Richardson vs. Harmon, 222 U. S. 96. As I understand they do not now seriously question the right of most of the respondents to invoke the rule, but say only that Hans J. Lunvaldt was master and E. A. Christenson was managing owner and that their responsibility is unlimited because their personal negligence

directly contributed to the accident. The difficulty with this contention is that the record would not support the requisite findings of fact. The amended libel appears to have been drawn upon the assumption of limited liability only, for otherwise there would seem to have been no reason for pleading the extent of the [172] proportionate interests of the owners. There is no intimation of a claim that the liability of some was of a different character than that of the others. Referring to the evidence it is to be said that, generally speaking, the testimony is to the effect that the mate was in charge of the work of removing the lumber. One witness I think testified that the master was informed that the slings were too short, but I don't recall that his name was given or that his interest, if any, in the schooner, was shown; nor do I remember that there was any evidence to establish who was the managing owner, or tending to fix upon him personal responsibility for the inadequate slings. As already suggested, the case seems to have been pleaded and tried upon the theory that the respondents all stand upon the same footing and that their liability is limited to their respective shares in the vessel.

As to the amount of damages the respondents contend that the findings is excessive and, upon further reflection and a consideration of numerous precedents, I have concluded that it should be reduced. There has, however, been no misapprehension of the legal principles involved. It is recognized that no award can be made for merely sentimental considerations or to assuage the grief of the bereaved. The

loss for which the libelants are to be compensated is a pecuniary one. But in any given case the amount thereof is necessarily to a large extent a matter of judgment touching which there is room for wide difference of opinion among reasonable men. The earning capacity of the deceased is an unimportant but not the only consideration. The pecuniary value of the life of a husband or father is not measured solely by the wages he earns in eight hours out of the twenty-four. The assistance he may, and often does, render in the other [173] sixteen hours in managing the household and maintaining the home, his services in caring for his family, his society, comfort and advice,—all may be of great value. It is suggested that I follow the rule in this jurisdiction, but I find no rule either statutory or otherwise and the precedents in this court to which my attention has been drawn are not sufficiently numerous or uniform to establish a rule. It is further suggested that inas much as the right of action is conferred by the statute of the State the standard of damages recognized by courts of the state should be adopted. Assuming, but not deciding, that place should be given to such a view it is sufficient to say that no standard is shown. As is to be expected the decided cases exhibit a wide diversity in the amounts recovered by claimants. I do not undertake to review or classify them, but some idea of their range may be gotten by reference to McGory vs. Pacific Ry. Co., 20 Cal. App. 671, where a $20,000.00 verdict was sustained, and Catlin vs. Union Oil Co., 31 Cal. App. 597, where a $17,000.00 verdict was not disturbed.

Without further discussion I find that in the death of the husband and father the libelants suffered a loss of thirteen thousand dollars ($13,000.00). For the reasons stated in the original opinion this amount will be divided and an award made to libelants on the basis of a total of Six Thousand Five Hundred Dollars ($6,500.00), two-thirds to the widow and one-third in equal parts to the three children; the latter are now mature. The decree will run against each respondent severally for his proportionate share; for example, if a respondent was the owner of one thirty-second part of the schooner, the decree against him will be for one thirty-second of the Six Thousand Five Hundred Dollars, or, if I have made a correct computation, $203.12. Libelants will also recover [174] their costs.

For a similar accident occurring now the amount would be thought to be inadequate, and upon the original submission the question was doubtless viewed too much in the light of present conditions. For some unexplained reason the case has been permitted to go untried for many years, but for aught that appears respondents are not chargeable with the delay, and for it there is no remedy.

May 1st, 1920.

[Endorsed]: Filed May 1, 1920. W. B. Maling. Clerk. By C. W. Calbreath, Deputy Clerk. [175]

At a stated term of the Southern Division of the United States District Court, for the Northern District of California, held at the courtroom in the United States Postoffice Building, in the City and County of San Francisco, State of California, on the —— day of May, one thousand nine hundred and twenty. Present: The Hon. MAURICE T. DOOLING, District Judge.

No. 13,310.

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, Infants, by Their Guardian and *Prochein Ami,* HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Libelants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, Jr., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON CO., a Corporation, ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Respondents.

Final Decree.

The above-entitled cause having come on for hearing on the pleadings and proofs adduced by the respective parties, and having been argued and submitted, and due deliberation having been had in the premises, and the Court having rendered its decision herein,—

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED, that Honora Della Flynn, in her own right, and as guardian of David James Flynn, Barbara Flynn and John Flynn, do have and recover from the respondents herein as follows:

From Respondent E. A. Christenson, owner of 2/32, the sum of $406.24;

From Respondent Hans J. Lunvaldt, owner of 2/32, the sum of $406.24; [176]

From Respondent J. H. Baxter, owner of 1/32, the sum of $203.12;

From Respondent J. Taveira, owner of 1/64, the sum of $101.56;

From Respondent W. B. Godfrey, Jr., owner of 1/32, the sum of $203.12;

From Respondent F. M. De Lano, owner of 1/32, the sum of $203.12;

From Respondent Walter V. Rohlffs, owner of 1/32, the sum of $203.12;

From Respondent R. L. Anderson, owner of 1/32, the sum of $203.12;

From Respondent George F. Quigley, owner of 1/32, the sum of $203.12;

From Respondent D. W. C. Tietjen, owner of 2/32, the sum of $406.24;

From Respondent Cecelia F. Sudden, owner of 1/32, the sum of $203.12;

From Respondent James Johnson Co., owner of 1/32, the sum of $203.12;

From Respondent Edmund Jacobs, owner of 1/32, the sum of $203.12;

From Respondent R. C. Sudden, owner of 1/32, the sum of $203.12;

From Respondent John L .Hubbard, owner of 1/32, the sum of $203.12;

From Respondent Louis Poole, owner of 1/32, the sum of $203.12;

—with interest thereon from the date of this decree at the rate of six per cent per annum until paid, together with libelants' costs and disbursements to be taxed, and that, in default of the payment of said sums by any of said respondents, execution issue against such respondents.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that said moneys be divided between said Honora Della Flynn and the said David James Flynn, Barbara Flynn and John Flynn, two-thirds to the said Honora Flynn, and the balance of one-third of said moneys to David James Flynn, Barbara Flynn and John Flynn in equal shares.

FRANK S. DIETRICH,
Judge of Said Court.

May 20, 1920.

[Endorsed]: Filed May 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

(Entered in Vol. 10, Judg. and Decrees, at page 13.) [177]

In the Southern Division of the United States District Court, Northern District of California, Division One.

No. 13,310.

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, Infants, by Their Guardian and *Prochein Ami,* HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Libelants,

vs.

E. A. CHRISTENSON et al.,

Respondents.

Notice of Appeal.

To the Respondents Herein and to Messrs. Frank & Mansfield, Messrs. Frank & Frank, Proctors for Respondents, and to the Clerk of the District Court for the Northern District of California, Southern Division:

You, and each of you, will please take notice that the libelants in the above-entitled cause hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the District Court of the United States for the Northern

District of California, made and entered in said cause on the 27th day of May, 1920.

Dated at San Francisco, California, this 15th day of July, 1920.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Libelants.

Receipt of a copy of the within notice of appeal is hereby admitted this 14th day of July, 1920.

NATHAN H. FRANK and
IRVING H. FRANK,
FRANK & MANSFIELD,
Proctors for Respondents.

[Endorsed]: Filed Jul. 15, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [178]

In the Southern Division of the United States District Court, Northern District of California, Division One.

No. 13,310.

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, Infants, by Their Guardian and *Prochein Ami,* HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Libelants and Appellants,

vs.

E. A. CHRISTENSON et al.,

Respondents and Appellees.

Assignment of Errors.

Now come libelants and appellants above named and assign the following as errors in the conclusions, findings, proceedings and decrees of the District Court:

I.

The Court erred in finding and deciding that the action abated against Respondents Charles E. Sudden, Henry Brooks, R. Y. Taylor, Robert Sudden, Albert Rowe, J. J. Staiger, George Johnson and H. Piltz.

II.

The Court erred in omitting to make, render and enter its decree against Charles E. Sudden, Henry Brooks, R. Y. Taylor, Robert Sudden, Albert Rowe, J. J. Staiger, George Johnson and H. Piltz, for the amount of the liability of each of the said Respondents.

III.

The Court erred in holding and deciding that, in the aggregate, the decree of the Court could be for only thirty-seven sixty-fourths of the aggregate liability of said respondents.

IV.

The Court erred in not holding and deciding that the decree [179] of the Court should be for the full amount of the aggregate liability of said respondents.

V.

The Court erred in holding the deceased chargeable with a want of due care.

VI.

The Court erred in dividing the damages by reason of the want of any or all due care on the part of the deceased, and in dividing the damages at all.

VII.

The Court erred in assuming that the liability of the respondents is several.

VIII.

The Court erred in assuming that the liability of the respondents is limited to their respective interests in the schooner.

IX.

The Court erred in finding and deciding that the liability of respondent E. A. Christenson is less than the full amount of the damages suffered by libelants.

X.

The Court erred in finding and deciding that the liability of Hans A. Lunvaldt, the master of the vessel, is less than the full amount of the damages suffered by libelants.

XI.

The Court erred in reducing the original amount of the damages fixed by the Court.

XII.

The Court erred in reducing the amount of damages suffered by libelants in the death of the husband and father from the sum of $20,000 to the sum of $13,000.

XIII.

The Court erred in dividing the amount of $13,000 and giving to libelants an award only on the basis of a total of $6,500. [180]

XIV.

The Court erred in ordering a decree against each respondent severally for his proportionate share.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Libelants.

Receipt of a copy of the within assignment of errors is hereby admitted this 14th day of July, 1920.

NATHAN H. FRANK,
IRVING H. FRANK,
FRANK & MANSFIELD,
Proctors for Respondents.

[Endorsed]: Filed Jul. 15, 1920. W .B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [181]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 13,310.

DAVID JAMES FLYNN, BARBARA FLYNN and JOHN FLYNN, Infants, by Their Guardian and *Prochein Ami,* HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Libelants,

vs.

E. A. CHRISTENSON et al.,

Respondents.

Bond for Costs on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That American Indemnity Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Texas, and licensed to do a general surety business in the State of California, as surety, is held and firmly bound unto the respondents in the above-entitled cause in the sum of Two Hundred and Fifty ($250.00) Dollars, to be paid to the said obligees, to which payment well and truly to be made it hereby binds itself firmly by these presents.

Signed, sealed and dated at San Francisco, California, this 15th day of July, 1920.

The condition of this obligation is such that, whereas, lately in the Southern Division of the United States District Court, [182] for the Northern Division of California, First Division, in Admiralty, in the above-entitled cause, a decree was entered in favor of the above-named libelants, from which decree said libelants have appealed to the United States Circuit Court o fAppeals for the Ninth Circuit.

NOW, THEREFORE, if the said libelants, as appellants, shall prosecute their appeal to effect, and shall pay all costs on appeal, if said appeal is not sustained, then this obligation shall be void, otherwise to be and remain in full force and effect and execution to issue thereon for the amount of such costs not exceeding Two Hundred and Fifty ($250) Dol-

lars, at the instance of any persons interested as aforesaid.

AMERICAN INDEMNITY COMPANY.
[Seal] By THEODORE P. STRONG,
Attorney in Fact.

[Endorsed]: Filed Jul. 15, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [183]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 13,310.

DAVID JAMES FLYNN, BARBARA FLYNN and JOHN FLYNN, Infants, by Their Guardian and *Prochein Ami,* HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Libelants,

vs.

E. A. CHRISTENSON et al.,

Respondents.

Notice of Filing Bond for Costs on Appeal.

To Respondents Above Named and to Messrs. Frank & Mansfield and Frank and Frank, Their Proctors.

You and each of you will please take notice that the libelants above named did, on the 15th day of July, 1920, file in the clerk's office of the above-entitled

court their bond for costs on appeal with American Indemnity Company, a corporation, as surety.

Dated July 17, 1920.

Yours, etc.
ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Libelants.

Receipt of a copy of the within notice for filing bond for costs on appeal is hereby admitted this 17th day of July, 1920.

NATHAN H. FRANK,
IRVING H. FRANK,
FRANK & MANSFIELD,
Proctors for Respondents.

[Endorsed]: Filed Jul. 17, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [184]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 184 pages, numbered from 1 to 184, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of David James Flynn, Barbara Flynn and John Flynn, Infants, by Their Guardian and *Prochein Ami,* Honora Della Flynn, Honora Della Flynn, Libelants, vs. E. A. Christensen et al., Respondents, No. 13,310, as the same now remain on file and of record in this office; said tran-

script having been prepared pursuant to and in accordance with the praecipe for apostles on appeal (copy of which is embodied in this transcript) and the instructions of the proctor for the libelants and appellants herein.

I FURTHER CERTIFY that the cost for preparing and certifying to the foregoing apostles on appeal is the sum of Eighty Dollars and Fifty Cents ($80.50), and that the same has been paid to me by the proctor for appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at San Francisco, California, this 23 day of August, A. D. 1920.

[Seal] WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk. [185]

[Endorsed]: No. 3542. United States Circuit Court of Appeals for the Ninth Circuit. David James Flynn, Barbara Flynn and John Flynn, Infants, by Their Guardian and *Prochein Ami,* Honora Della Flynn, Honora Della Flynn, Appellants, vs. E. A. Christenson, Hans J. Lunvaldt, Charles E. Sudden, J. H. Baxter, A. Taviera, W. B. Godfrey, Jr., F. M. Delano, Walter V. Rohlffs, R. L. Anderson, Geo. F. Quigley, D. W. C. Tietjen, Cecelia F. Sudden, Henry Brooks, R. Y. Taylor, Robert Sudden, Jas. Johnson Co., a Corporation, Albert Rowe, J. J. Staiger, Edmund Jacobs, R. C. Sudden, Geo.

Johnson, John L. Hubbard, H. Piltz, Louis Poole, Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 23, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

DAVID JAMES FLYNN, BARBARA FLYNN and JOHN FLYNN, Infants, by Their Guardian and *Prochein Ami,* HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Libelants and Appellants,

vs.

E. A. CHRISTENSEN et als.,

Respondents and Appellees.

Order Extending Time to and Including September 15, 1920, Within Which to File Record and Docket Cause.

GOOD CAUSE APPEARING THEREFOR: IT IS HEREBY ORDERED that the time of libelants and appellants above named, within which to print the record and file and docket this cause on appeal in

the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to and including the 15th day of September, 1920.

Dated August 13, 1920.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals, for the Ninth Circuit.

[Endorsed]: 3542. In the United States Circuit Court of Appeals, for the Ninth Circuit. David James Flynn, Barbara Flynn and John Flynn, Infants, by Their Guardian and *Prochein Ami,* Honora Della Flynn, Honora Della Flynn, Libelants and Appellants, vs. E. A. Christensen et als., Respondents and Appellees. Order Extending Time to and Including September 15, 1920, Within Which to File Record and Docket Cause. Filed Aug. 14, 1920. F. D. Monckton, Clerk. Refiled Aug. 23, 1920. F. D. Monckton, Clerk.

No. 3542

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, infants, by their guardian and prochain ami, HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Appellants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, JR., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON CO. (a corporation), ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Appellees.

BRIEF FOR APPELLANTS.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants.

No. 3542

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, infants, by their guardian and prochain ami, HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Appellants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, JR., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON CO. (a corporation), ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Appellees.

BRIEF FOR APPELLANTS.

I. STATEMENT OF THE CASE.

A. The Facts.

Defendants are the joint owners of the lumber schooner "Sophie Christenson"; libelants are the widow

and children of James Flynn, a longshoreman employed by and killed on board of the schooner, and they sue for damages suffered by the loss of husband and father.

On August 3, 1903, the schooner was lying in the port of San Pedro, discharging a cargo of lumber. She lay portside to the wharf, with a list to port created intentionally for the purpose of causing the cargo-gaff, after the load was attached, to swing out to the wharf. The cargo loads were placed in a rope-sling with an eye at each end; one end of the rope was placed around the load, then drawn through the eye at the other end, and the free eye was put on the hook of the donkey-fall hanging from the end of the cargo-gaff. Two sailors on deck, on the starboard side of the main hatch, had made up a slingload of large timbers, called mining timbers; this load was hoisted up by means of the donkey engine, then lowered and swung out across the deck to the wharf. Instead of lowering it all the way down to the wharf, the donkeyman "held on", in consequence of which one end of the dangling load struck the railing of the wharf, and the shock caused some of the pieces to fall out of the load into the water, between the wharf and the schooner's side. James Flynn and a sailor named Soderquist had been engaged in making up slingloads on the port side of the schooner, between the mizzen and main masts. While the particular load was first hoisted up and swung across the deck and was then lowered to the wharf, they stepped back from under the path of the load to a position aft of the mizzen mast;

but after the load had cleared the deck, they resumed their work of making up the next load to be discharged. When the pieces fell out of the load into the water between the schooner and the wharf, the gaff, with the lightened load, *swung back* to the deck, and all the remaining pieces slipped out of the sling, striking both Flynn and his mate. The blow was received by Flynn on the back of his head, causing his death.

B. The Findings and Conclusions of the Lower Court.

(a) The lower court held that the respondents were negligent in providing rope slings of insufficient length for the proper discharge of the lumber, viz.: slings which were only long enough for a single turn; that this use with only a single turn was extra hazardous, and that the accident would not have occurred if the double turn had been employed.

(b) The lower court also held that the deceased was chargeable with a want of due care, and accordingly divided the loss suffered by libelants between libelants and respondents.

(c) The court, in its first decision, found the loss suffered by libelants to be the amount of $20,000, but reduced this amount, in the later decision, to $13,000, without new evidence intervening. Accordingly, in the first decision, the court awarded libelants upon the basis of $10,000, but reduced this amount, in the later decision, to $6500. The court also held that the action had abated as to certain respondents whose death had been suggested to the court, which reduces the total amount

of the recovery from the respondents to the sum of $3757.72.

C. The Final Decree.

The final decree signed by the court runs against each living respondent severally for his proportionate share in the vessel. The result is that libelants could recover, under the decree, small amounts from each of sixteen respondents, the total sum recoverable being $3757.72, as damages for the loss suffered by the death of husband and father.

D. The Questions Raised by this Appeal.

1. Whether the lower court was justified, on the facts, in holding the deceased chargeable with a want of due care, and dividing the damages on this ground.
2. Whether the lower court was justified in reducing the amount of the loss suffered by libelants from $20,000 to $13,000.
3. Whether the lower court was justified in further reducing the award to libelants by making the decree against each living respondent severally for his proportionate share in the vessel.

II. SPECIFICATION OF ERRORS RELIED UPON.

The detailed specifications are contained in the Assignment of Errors (200).* They may be epitomized as follows:

First. Neither the findings of fact, by the court, nor the evidence, support a conclusion that the de-

*Figures in parenthesis refer to pages of Apostles.

ceased contributed to the accident by his own want of care;

Second. The court erred in reducing the amount of the loss suffered by libelants from $20,000 to $13,000;

Third. The decree should have been made for the full amount of the damages against the surviving respondents in solido.

Fourth. If not, then the decree should have been made against each living respondent severally for his proportion of the full amount of the damages which his individual share in the vessel bears to thirty-seven sixty-fourths.

Fifth. In the cases of respondents, E. A. Christenson and Hans J. Lunvaldt, managing owner and master, respectively, of the schooner, the decree should be made for the full amount of the damages awarded to libelants.

III. BRIEF OF THE ARGUMENT.

Appellants appreciate that, having been granted an award for the loss suffered by the death of the mainstay of their family, they were successful in a measure and that they are taking certain chances in bringing this case up on appeal; but they appear here persuaded that Judge Dietrich, had the limited time at his disposal for the hearing of their cause made this possible, would himself ultimately have come to a conclusion more favorable to their cause, and convinced that this

court, upon a review of the facts of this case, will find that the husband and father, who lost his life while working for the support of his family in a naturally hazardous occupation, should not be stigmatized with the charge that he had an equal share in causing his own death with those who were clearly indifferent to his safety; especially where this charge is coupled with the fact that the desire to save the time of his employers, the zeal for *their* interest, was the only motive that could have actuated him in going back one fatal moment too soon, to the spot where he must perform his labors and which had now become a danger spot. This widow, and these children of the deceased, now grown up, feel that while the demands of charity might be formally satisfied by the meager award decreed, the widow at least should receive an adequate compensation for the years of struggle caused by the fault of those well able to respond to the demands of justice.

First: The Charge of Contributory Negligence.

The *findings* of the lower court, which have a bearing on the question, are:

(1) There was but a single peril, the slipping of timbers from the load (189).

(2) It was possible for him to be on guard until the load swung on to the wharf in harmony with the practice followed by some of his fellow employees (189).

(3) The long timbers slipped out *after* the load had reached the wharf railing (189). When the bundle

struck the railing of the wharf, some of the shorter pieces were shaken out and thus the size of the bundle was reduced—and from the partially open loop thus left the other pieces, by one of which the deceased was struck, easily escaped (188).

(4) That this was a casualty which is not shown by the evidence to be of frequent occurrence (189).

The court made the following *conclusions*:

(1) (Expressly): That it was his duty to exercise care commensurate with the degree of peril.

(2) (Expressly): That it was incumbent upon him, in the exercise of due care, to keep a lookout until danger was passed (189).

(3) (Impliedly): That the deceased was chargeable with a want of due care (190).

The implied conclusion can only be sustained upon the basis of an implied finding that the deceased did *not* exercise care commensurate with the degree of peril, and did not keep a lookout until danger was passed. If the evidence shows that he did so keep a lookout, then there is no ground for the implied conclusion that the deceased was chargeable with contributory negligence.

We contend:

(a) The express *findings* of the court are not only consistent with, but corroborative of, the assumption of the exercise of due care by the deceased.

(b) The implied finding that the deceased did not exercise due care is manifestly contrary to the *evidence*.

A. The findings.

The court found that the trouble began "*after* the load had reached the wharf railing," in other words, after the load had passed over and beyond the place where the deceased and his mate were working on deck. Unless it could be reasonably expected that the load would come back in the natural course of events, the danger of pieces dropping from the load upon the deceased was then passed. After the load had swung on to the wharf, it was not expected to return to the vessel. Clearly the deceased had then a right to expect that the load would not swing back from the wharf to the deck of the vessel, and, in fact, it could not have swung back but for the additional negligence of respondents in failing to provide the proper equipment to keep the load on the wharf after it had once swung out. The court found that the slipping of the long timbers, in this instance, was "a casualty which is not shown by the evidence to be of frequent occurrence" (189). Therefore, it was not a casualty to be expected by the deceased. His duty extended only to the exercise of care commensurate with the degree of perils to be expected, not to the anticipation of a peril which did occur, but which could not be expected. Neither the danger of long timbers slipping out *after the load had reached the wharf railing,* nor the danger of the partial load swinging back over the deck and eventually dropping out entirely were such dangers as made it incumbent upon the deceased to keep a lookout. His duty to stand back and remain back, or keep a lookout, had ceased after the load had left the

deck and reached the wharf railing; this duty applied to the period of time while the load was being hoisted up from the starboard side, was swung athwartship to and beyond the port side, and was thence lowered to the wharf; after the load had swung beyond the ship and passed to the wharf railing, the duty to keep a lookout had ended. His duty to keep a lookout was then superseded by a new duty to the employer, viz., to go back to his place and make up the next slingload.

B. The evidence.

The evidence shows positively that the deceased in fact kept a lookout until all dangers which he was bound to anticipate were passed.

The particular load which slipped out of the sling and caused the death of the deceased consisted of mining lumber, "12 by 12s, and I suppose 20 pieces in it" (Master, for the defense, 180), and in length it ran from 10 to 24 feet (130). It was made up by seamen Ehlert and Cainan, on the starboard side of the main hatch (86). When the sling, after one turn around the load, was hooked on to the boom-tackle, the mate gave a signal and the load was hoisted up by the man at the donkey engine, at a slant. When at sufficient height, the mate gave another signal, and the load was lowered by the donkeyman. At the same time the gaff and the load hanging from its free end swung out towards the wharf, on account of the list of the vessel towards the wharf. Up to this time "everybody was out of the way, all walked away, and the load swung into the wharf" (Master, 180). The evidence shows that the

deceased did stand back while the load was going up. On this point the testimony is as follows:

Nillson, donkeyman, as witness for *respondents,* testified:

"Q. Do you know whether or not the man had stood clear when the mate called out, and went back again to his work?

A. I don't know that.

Q. You do not know?

A. I don't know that" (26).

Lungvalt, master, as witness for *respondents,* testified:

"Q. Did you see the accident? A. I did" (180).

"*Everybody was out of the way, all walked away,* and the load *swung in to the wharf.* * * * Mr. Flynn, the man that got hurt, had gone back, he was warned to get away and *he was away, he was between the poop and the mizzenmast,* but he went back again; nobody told him to go back; he went back on his own account" (180).

"Every man generally looks out for the load and looks after it until it is clear or gets landed, and then the men go to work again" (184).

On Cross-Examination

"Q. Did you see the lumber when it struck Mr. Flynn?

A. I did.

Q. You stated, did you not, that it came back from the wharf?

A. *Yes, it swung off the wharf* and a piece fell out; it stood on end this way, and the other end hit Mr. Flynn right in the head" (184 and 185).

Buckley, foreman of the lumber company to which the lumber was delivered, and who had charge of the

receiving of the lumber and placing it on the wharf (130), testified:

"Q. What is customary?

A. They will *see the load leave*—they *start it toward its destination*—then follow their regular work" (141).

NILLSON, donkeyman, witness for *respondents,* testified:

"Q. And if he had to stand clear while one load left until it got on to the wharf, he would have to quit work until it is done?

A. If he sees it is a dangerous load.

Q. But if he does not see it is a dangerous load, he is expected to go on working, making up another load? A. Yes, sir.

Q. He is working where the lumber is?

A. Yes, the spot where the load is going up there; he has to be there all the time.

Q. He is not expected to stand clear, and does not stand clear, unless he sees it is a dangerous load?

A. The mate has his eye on the load, and when he sees anything wrong, he sings out" (37).

EHLERT, the man who made up the fatal load, called for libelants, testified on cross-examination:

"Q. Did you hear anybody call out to stand clear when your load went up?

A. Yes, sir; not when the load went up, but when the load fell. That is the time they sang out to stand clear, but it was too late then.

Q. It was too late then? A. Yes, sir.

Q. You are sure no one said to stand clear until the load fell? A. That is right" (92).

NILLSON, the donkeyman, testified:

"I was heaving up a load of lumber, and when I got the load up high enough, the gaff was hang-

ing out a little, so *she came over the wharf life.* While she was hanging so * * * hanging over the rail like * * * a few pieces—I don't know how many—six or seven of those short planks fell out, and they fell right between, into the water. * * * Just after a little while those planks that were left, they fell off the sling and fell in the same direction that man was at work" (25).

EHLERT testified:

> "*When the load came back,* it hit the stringer on the wharf because the ship was lower than the stringer * * * and it shook it, and half of it fell out between the ship's side. There were three planks left, and the gaff swung inside because there was nothing to hold it on the wharf. The gaff *swung in,* and the planks, what was left, fell between the ship's side and the wharf; three planks were left and they *swung in* and killed him" (78).

LUNGVALDT, master, explains the cause of the return of the load from the wharf to the deck as follows:

> "When it came into the wharf *the donkeyman did not let it go;* he could have let it go, but *he kind of held on, and the load swung back"* (180) .

CAINAN, the other man who made up the fatal sling-load, testified:

> "Q. How many gaffs were used in discharging?
> A. One, sir.
> Q. Whereabouts was that gaff located?
> A. It was resting on the mainmast, sir * * * (40).
> Q. After the load struck the stringer of the wharf, what happened then?
> A. It shook the load, and some pieces fell down between the ship and the wharf, and the *remaining three pieces swung aboard,* and one piece struck this man Flynn. * * * He was just lifting a big piece of timber so as for another man to put the

block under the piece of timber so as to allow the sling to go underneath * * *'' (46).

Q. Whereabouts on the deck was he at that time?

A. He was more near to the mizzenmast'' (47).

On cross-examination by Mr. Frank this witness testified:

''Q. Now, as I understand you, *this had passed clear over the vessel and over to the wharf, and then struck the wharf,* and most of the load fell in between the wharf and the vessel into the water?

A. Most of the load fell between the wharf and the vessel's side.

Q. When this was swung over, what were you doing?

A. I was looking at it. We generally look to see that it *goes clear of the ship''* (64).

Baker, tallyman on the wharf, testified:

''Q. Do you know whether the load did swing back in this case—being unloaded at the time Mr. Flynn was killed?

A. I do not know whether I was in the back or the front—I am not sure—*but I am sure it swung back''* (115).

On cross-examination by Mr. Frank this witness testified:

''Q. Do you know whether or not any slingload other than this one, if this one did swing back, swung back on the vessel?

A. You want to know if any other slingloads beside this one that I think swung back?

Q. Yes. A. No, I do not remember.

Q. And as a matter of fact, you don't know whether this one swung back, except that you judged that it did?

A. To the best of my recollection I judge it swung back'' (121).

All of the testimony cited was given by deposition, except the testimony of the master, who was called by respondents, and testified in open court. It is significant that respondents did not take the testimony of the mate whose business it was to superintend the work of discharge; undoubtedly he could have thrown light upon the details of the transaction and, if the defense of contributory negligence on the part of James Flynn could be supported by evidence, would be naturally the best witness whom the respondents would have called; for it would have been his interest to support the charge of negligence against the deceased in order to exonerate himself from the corresponding charge.

The testimony cited shows without conflict: FIRST. That the load first swung out over the vessel to the wharf without any mishap; that while it swung out "everybody was out of the way, all walked away. * * * Mr. Flynn had gone back; * * * he was away; *he was between the poop and the mizzenmast*" (the master); SECOND, that when he was hit by the piece of lumber falling out of the sling, he was between the main mast and the mizzenmast, more near to the mizzenmast," and had just stooped over to lift a big piece of timber (Cainan); THIRD, that between the time when he was between the poop and the mizzenmast and the time when the timber fell on him, he had gone back again to his place of work with Soderquist to make up the next load with him (the master); FOURTH, that before he went back, the slingload had "swung in to the wharf;" that "when it came in to the wharf, the donkeyman didn't let it go, but he kind of held on" (the

master); that the end of the load struck against the wharf and thereupon part of the load fell out; that the load, thus lightened and loosened, *returned* to the deck and, when the remaining pieces fell out, one of them struck the deceased a fatal blow, and injured his mate slightly. The evidence clearly supports the finding of the court that the long timbers slipped out "*after* the load had reached the wharf railing, a casualty which is not shown by the evidence to be of frequent occurrence," a casualty, therefore, which it was *not* his duty to guard against. It is easy to conjecture what the consequences would have been had the crew and longshoremen not promptly returned to their work after the load had swung out to the wharf and the usual dangers had thus passed. The danger which caused the death of James Flynn and the injury to his mate was not the danger which might have been anticipated, viz., the danger of small pieces dropping out of the load while it was swinging across the deck, but the unusual danger arising in consequence of the failure of the donkeyman to lower the load properly and the consequent collision of the load with the deck stringer—a *new* danger not to be anticipated and which indeed could easily have been avoided, had the owners performed their duty of providing the equipment (by Spanish burton or other contrivance) to keep the load out on the wharf after it had once reached that position.

The record shows, therefore, that the findings of the court below are consistent with the conclusion that the deceased kept a proper lookout until dangers to be ex-

pected had passed, and therefore did not contribute to the fatality; and also that the evidence, without any contradiction which we are able to discover, points affirmatively to the same conclusion.

Another consideration pointing in the same direction is the following:

Had the deceased returned to his place of work before the load swinging across the vessel to the wharf had actually reached the wharf, nay, had he never stepped aside or kept a lookout (neither of which suppositions is supported by the evidence), the negligence thus assumed on his part would have continued only to the moment when the load reached the wharf and not to the moment when he was struck down; and was not contemporaneous and concurrent with the negligence of respondents. The assumed antecedent negligence of the deceased would not be a contributory cause of his death, but the negligence of respondents, continuing and intervening between this assumed negligence of the deceased and the accident, would still be the sole proximate cause of his death. His assumed negligence in returning to his place of work too promptly would have terminated after the load had swung out to the wharf; the fatal injuries could and would still have been avoided but for the later and supervening negligence of the owners in failing to provide the proper equipment for keeping the load from returning to the vessel after it had struck against the wharf. The respondents had the "last clear chance" to prevent the injury to the deceased.

Indeed, this defense of contributory negligence bears a cynical character in this case. Such a defense may be properly expected in cases of accident and resulting injury arising out of acts independent of the employment, while the deceased pursues solely his own pleasure or convenience. In the case at bar the deceased was not bent upon his own pleasure or convenience; he was engaged in the performance of a hazardous duty imposed upon him by his employers. These employers now argue: He was too zealous in the performance of his duties; he should not have gone to work so promptly; his rare diligence constitutes negligence and excuses or extenuates our fault. What would have been the feelings of James Flynn if, on his deathbed, he had realized the force of this cold-blooded argument—that the value of his life to the widow and orphans should, by the law of the land, be cut down by one-half because, forsooth, he was so good a workman, so faithful to his employers, so devoted to their interest?

Second: The Loss Suffered by Libelants.

In the original decision, on April 16, the court found that, in the death of the husband and father, the libelants suffered a loss of $20,000.

In the modified decision, on May 1, the court found that libelants' loss was $13,000. No new evidence had been presented in the interval. The amount of damages in cases of this nature is to a large extent "a matter of judgment, touching which there is room for wide difference of opinion." The court below discussed the

general principles governing this matter very ably in the second memorandum decision; but it is respectfully submitted that all the principles and authorities discussed therein (192, 193) tend to show that the court had *not* erred in fixing the libelants' loss at the larger amount, and that the contentions made by respondents, between April 16 and May 1, that the original amount was excessive, were not sound. The rule contended for by respondents, viz., that the standard of damages recognized by the courts of the State of California should be adopted, leads to the following results:

In the *Catlin* case (31 Cal. App. 597), deceased was a carpenter's helper, 44 years old, earning $2.75 per day. He left a widow and four children. His life expectancy was 25 years. The jury returned a verdict for $17,000, and the court held this not to be excessive.

In the *McGrory* case (22 Cal. App. 671), deceased was a butcher, 25 years old, earning $20 per week. He left a widow and infant daughter. Life expectancy 38 years. The verdict was for $20,000, and the court held this not to be excessive.

In the case of *Morgan v. Southern Pacific Co.,* 95 Cal. 501, a verdict of $15,000 for personal injuries to a woman was held not to be excessive.

Deceased, in the instant case, was 42 years of age, and left a widow and three minor children, aged ten, six and four years.

Third: The Decree Should Be for the Full Amount of the Damages Against the Respondents in Solido.

That vessel owners are liable in solido for the torts of the vessel incurred in the natural course of business by master, managing owner and other parties holding the relation of agent to such vessel owners is a settled principle of American and English law.

Hughes, Admiralty, p. 298.

The decree was ordered and made against each respondent severally for his proportionate share in the vessel, the court applying the act of June 26, 1884, sec. 18 (6 Fed. Stat. Ann. 368). Section 18 reads as follows:

> "That the individual liability of a ship owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole."

Appellants contend that the decree should have been made against the respondents *jointly* and *severally* for the full amount awarded to libelants, and not severally against each.

The Supreme Court, in *Richardson v. Harmon,* 222 U. S. 96, decided that, under this section, each part owner is still liable in toto for his own fault and neglect. *Prima facie* each respondent is liable as a tortfeasor for the whole amount of the damages. The limitation applies only to cases of loss and injury caused without the fault of the particular respondent. Each particular respondent claiming the limitation must first show that he was not personally at fault in failing to provide the slings which were not long enough for a double

turn, a failure which the court has found to be negligence. None of the respondents have made such a showing, but, as will be hereafter seen, the evidence connects two of them directly with the negligence which caused the death of deceased.

Fourth: Assuming that Each of the Respondents Against Whom the Decree was Rendered had Shown Himself Entitled to the Limitation of Section 18, the Decree Should Be Against Each Individually for that Proportion of the Full Amount of the Damages Which His Individual Share in the Vessel Bears to the Whole of the Shares Liable.

The decree of the court below was, in the aggregate, for 37/64 of the award, the owners of the remaining 27/64 having died since the commencement of the action. The decree made against the owner of a 1/32 part of the schooner was for 1/32 of the liability of respondents. Libelants contend that, following this doctrine, 37/64 are required to pay $6500; therefore, each respondent owning 1/32 (being equal to 2/64) should pay 2/37 of $6500 or $351.35, instead of $203.12, as the decree adjudges.

Fifth: If Not Against All the Respondents, then at Least Against E. A. Christenson, Managing Owner, and Hans J. Lungvaldt, Master of the Schooner, the Decree Should Be for the Full Amount of the Damages Awarded to the Libelants, Without Limitation.

If the first award of the court below be affirmed, the decree against each of these particular respondents should be for $10,000; if the assumed contributory negligence of the deceased is eliminated by this court, the

decree against each of these respondents should be for $20,000; if the second award were affirmed, the decree against each of these respondents should be for $6500; and if, on the basis of the second award, the assumed contributory negligence of the deceased is eliminated, the decree should be against each of these respondents for $13,000, for the following reasons:

The court below decided that the failure to provide slings long enough for a double turn constituted negligence. If this failure is due to the personal act or neglect of these respondents, they at least cannot claim the benefit of any statute limiting their liability.

A. The master.

As to respondent, Hans J. Lunvaldt, who was the master of the schooner at the time of her discharge, and who testified as an eyewitness of the accident, the testimony shows that the slings for the discharge of the lumber were provided by him.

> "Q. By whom were the slings provided which you used in making the loads? A. The captain.
> Q. How do you know they were provided by the captain?
> A. Because the mate told me, when they were making the slings, he told the captain 'they were too short'" (*Ehlert,* 75).
> "Q. Did you know the master of the vessel while the discharging was going on, Mr. Woodson? * * *
> A. Well, I saw him there, yes.
> Q. Did you speak to him about the kind of slings and ask him to use different slings?
> A. No, sir; I did not, but Mr. Butler did.
> Q. Who is Mr. Butler? A. He is foreman of the yard.

Mr. Frank. Q. Did you hear Mr. Butler say it?
A. Yes, sir. * * *
Q. What did he say to the captain?
A. He told him not to use those slings; they were too short.
Q. Did you hear what the captain said in reply?
A. The captain said that is all the slings that he had" (Woodson, 149, 150).

The evidence shows that the name of the foreman of the yard who remonstrated with the captain was not Butler, but Buckley. He had 21 years' experience in this business and proved a careful and impartial witness when his deposition was taken by libelants. He testified:

"I saw what they were doing—making one turn —and I asked them to make the second turn or get chain slings.
Q. Who did you ask that?
A. Either the master or the mate—this is so long ago it has gotten out of my head, but I asked some one there—the mate or the captain. Well, they told me the sling was not long enough; I had them try it and it would not go around the load when they first started. * * *
Q. And you did not want to get your men hurt on the wharf?
A. That's what I told the mate or captain.
Q. What did they say?
A. They tried to get it around, but it would not reach and then *they used one turn*" (*Buckley,* 132).

The master testified, when questioned by his counsel:

"Q. Did Mr. Buckley, or anybody else, come to you and make any protest about using a single turn rope? A. No, sir; no, sir" (181).

It will be noted that he *did not* testify that he did not know that the discharge was made in the manner

found to constitute negligence on his part, he being one of the owners. He did testify, however, that

> "If I was sending up a load of large number, I would use a *single turn*. On that kind of lumber, it is not necessary to use a double turn. * * * This was just one single turn, with about 18 or 20 pieces in it. It was only necessary to put one turn around it. In that kind of load they will make them single because they can load them so much easier in the truck; * * * they never slide out; they jam up together" (183).

It thus appears by his own testimony that his judgment did not agree with the conclusion of the court below that this method, approved by this part-owner and respondent, constitutes negligence. His testimony shows clearly that this part-owner and respondent, at least, *did* know the method of discharge by the inadequate slings, and approved of it. Under these circumstances the protest of Mr. Buckley was naturally of no effect. We ask this court to find that the protest was in fact made. One witness so testified positively; another witness testified that he protested either to this respondent or to the mate; the respondent himself, while he denies that the protest was made to him, indicates clearly by his testimony that it would not have been heeded if it had been made.

The personal negligence of this respondent in providing, as master of the vessel, inadequate slings and in sanctioning a mode of discharge which the court has found to constitute negligence, was the direct cause of the accident.

The law is that part-owners of a vessel, personally negligent, cannot claim the exemption of the statute of limitation of liability at all. The statute does not displace the liability of a shipowner for a loss caused by his own negligence.

Hughes, Admiralty, p. 321;
The Republic, 61 Fed. 109 (C. C. A. 2nd Cir., 1894);
Rudolf v. Brown, 137 Fed. 106.

B. The managing owner.

The same argument applies (perhaps with less force, but with sufficient cogency) to the case of the managing owner. It was "the non-delegable duty" of all respondents, as the court held, "to take reasonable care in providing safe appliances for carrying on the work." The court has found that inadequate appliances were provided, and that the failure to provide adequate appliances caused the death of deceased. In addition to this, the evidence on the part of respondents does not only fail to show that safe slings and a safe contrivance to keep the loads from swinging back from the wharf to the ship (which contrivance would have prevented the death of deceased) were in fact provided; but their evidence shows boldly and ostentatiously that no such contrivance or equipment was in fact provided, for the reason that it was not considered necessary. Whether it be named a "Spanish burton" or be given any other name, reason, and, indeed, common sense would persuade any open mind that the failure to prevent a heavy load from swinging back to the vessel was an unneces-

sary and avoidable extra hazard, and that the life of the deceased would have been saved, had the ship provided some contrivance to prevent it.

The *normal* and personal duties of the managing owner of a vessel include the duty

> "(1) to see to the proper outfit of the vessel, in the repairs adequate to the voyage, and in the tackle and furniture necessary for a seaworthy ship;
> (2) to have a proper master, mate and crew for the ship, so that in this respect it shall be seaworthy."
>
> *Hughes, Admiralty,* p. 298, citing Bell's Commentaries.

Unquestionably it was the duty of Mr. E. A. Christenson, respondent, to provide adequate slings for the discharge of this lumber vessel.

In order to gain the benefit of the limitation of liability under section 18, it was incumbent upon him to show that the accident and consequent damage in the instant case was incurred without any fault or negligence, on his part, in the furnishing of the adequate discharging slings, and other safe equipment of the vessel, and that the fault and negligence shown in the use of the improper equipment was not due to any fault or negligence on his part. There is no such evidence in the case, and he is not, therefore, entitled to a decree for the limited amount.

The decree against E. A. Christenson, managing owner, should therefore be for the full amount of the damages awarded.

CONCLUSION.

We do not contend that all the points raised by this appeal are of equal force; we know that some involve matters of judgment, on which there may be reasonable doubt. We think, however, that conflicting arguments of similar weight should be resolved against the respondents irrevocably charged with negligence, and in favor of the widow whose long and unequal struggle to furnish bread and an education for her growing children was caused by the negligence of respondents.

We feel keenly that the charge of contributory negligence against the husband and father killed in the performance of his duties to respondents is harsh, cruel, and without foundation in fact, and that this court should, and will under the evidence, eliminate it from this case.

Whether the life of this faithful man was worth $20,000, as Judge Dietrich first found, or whether it was worth only $13,000, as he later concluded, without further evidence on the subject—that, indeed, is a matter of judgment, upon which there is room for wide difference among reasonable men. We believe that, had Judge Dietrich not been embarrassed by lack of time before his return to his own jurisdiction, he would have been persuaded that adherence to his original conclusion would have been in consonance with principles of justice and his own real inclination. But whether this court awards the larger, or the smaller sum, the award should be decreed for the full amount, in solido, against all the respondents, they not having shown that they are entitled to any limitation, or at least for the full

amount against the two respondents, E. A. Christenson and Hans J. Lunvaldt. Such a decree would be doubly justified against respondent Lunvalt, who, as a witness, told the court that he had "no interest whatsoever" in this case.

The present decree is a hollow comfort. If Mrs. Flynn has to collect these small sums from various respondents whose whereabout are unknown to her and who may be unwilling or unable to pay the respective judgments against them, the award of the court may prove to be a new source of trouble and expense to the widow who spent a large part of her life in a struggle for the existence of her family, which would have been spared to her but for the negligence of respondents.

Dated, San Francisco,
October 9, 1920.

Respectfully submitted,

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants.

No. 3542

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, infants, by their guardian and prochain ami, HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Appellants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, JR., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON CO. (a corporation), ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Appellees.

BRIEF FOR APPELLEES.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellees.

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Appellants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, JR., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON CO. (a corporation), ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Appellees.

BRIEF FOR APPELLEES.

Statement.

The litigation which is the subject of this appeal was initiated nearly 17 years ago, and involves an injury

received on the 3rd day of August, 1903, by James Flynn, who was at that time in the employ of the owners of the schooner "Sophie Christenson" as a stevedore, in the discharge of a lumber cargo from that vessel at the port of San Pedro, California.

The injury thus suffered, resulted in the death of Flynn.

Each of the appellees, with the exception of E. A. Christenson, was at the date of the accident the owner of a separate share or shares in the vessel, and they are sued by the wife of Flynn in her own behalf, and that of her children, who have now all reached maturity, for damages which they claim arise out of the accident.

The action was filed on the 12th day of August, 1904, and was not set for hearing until April 12, 1920.

At the time of the accident the vessel was discharging by means of a rope sling with a single turn, which the testimony shows was in general use in the discharge of cargoes of the nature in question, and the Court in fact found that the rope sling was in general use, while the single turn was not unusual.

In discharging, the vessel lay with her port side to the dock, and with a slight list toward the wharf for the purpose of allowing the free swing of the cargo gaff, to the dock, when bearing the load. The loads were placed in a rope sling, which contained an eye at each end; one end of the sling was placed around the load and drawn securely through the eye at the other end, when the load was then attached by means of the free eye to the hook on the fall on the cargo gaff. The

load was then hoisted by means of a donkey engine and swung to the wharf.

Flynn, at the time of his injury, was working on the deck of the vessel, under the mate, and in the same relationship to the mate and the rest of the vessel's crew, as any member of the crew.

He had been thus engaged for in the neighborhood of from 2½ to 3 days before the accident, and was a man of experience as a longshoreman, and as mate of vessels, and was familiar with the discharge of lumber cargoes.

It is without dispute that chain slings were on board the vessel in addition to the rope slings used, and libelant's witness testifies that the slings were laid out by the mate, and that the men engaged in unloading the cargo picked the slings out themselves and made the load up in such sizes as they saw fit.

The situation at the time the injury was occasioned follows:

A sling load of lumber had been made up on the starboard side of the vessel by two members of the crew, Cainan and Ehlert. Flynn, together with a member of the vessel's crew, was at the same time engaged in making up a slingload on the vessel's port side.

The load made up by Cainan and Ehlert had been attached to the donkey-fall, the mate had given the order to the donkeyman to go ahead, and all had been warned to get out of the way, and had obeyed the warning. The slingload was hoisted, and the mate gave the order to lower away after it had swung across the deck

toward the wharf. In lowering away, the load struck the stringer of the wharf, causing some pieces of lumber to fall into the water between the vessel and the dock, and some other pieces to fall on the vessel's deck. As the vessel was at the time lower than the wharf, it is evident the load never cleared the vessel, and as the result of striking the stringer it was caused to swing back. One of the pieces of timber which fell to the deck struck Flynn, who had gone back to his particular load before the load which was being hoisted had been landed.

The injury which resulted in Flynn's death was thus occasioned.

Appellants claim that appellees were chargeable with negligence in not providing, as they allege, proper slings and a so-called Spanish burton to guide the load.

It is further contended that chain slings should have been supplied.

NO RIGHT OF ACTION IN THE LIBELANTS.

At the outset we desire to call the Court's attention to the fact that the death resulting from the injury on which this cause of action is based, occurred on the 3rd day of August, 1903. Amended Libel, art. VIII and XII; Rec. pp. 8 and 9; Testimony of Mrs. Flynn, Rec. p. 156.

The libel was filed herein on the 12th day of August, 1904, Rec. p. 3, or more than one year after the accident and death, and more than one year after the cause of action accrued.

As the right of action in the admiralty for death depends on the Statute of the State of California, Sec. 377, C. C. P., which is as follows:

> "When Representatives May Sue for Death of One Caused by the Wrongful Act of Another. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just."

And as a statute of the State of California limits the time within which such actions may be brought to one year, C. C. P. 340, Subd. 3:

> "Within One Year. 3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check,"

it is manifest that at the time the original libel was filed, there existed no cause of action in the libelants herein.

To quote from *Hughes on Admiralty,* 2 Ed., Sec. 113, p. 233:

> "Restrictions of State Statute Binding.
>
> As the right to sue depends on the state statute, it follows that the state, in giving the right, may name the conditions on which it is given. Hence the restriction of the right to sue to one year, contained in Lord Campbell's Act and embodied in

> nearly all the state statutes based upon it, is binding on suits in the admiralty court. *This is not a statute of limitations, but a condition on which the right is given,* and *performance must be shown by the plaintiff* as a part of his case."

The author then cites the cases of

> *Harrisburg,* 119 U. S. 199;
>
> *Stern v. La Compagnie Generale Transatlantique,* D. C. 110 Fed. 996;

and other cases, among which is that of

> *Western Fuel Co. v. Garcia,* 255 Fed, 817,

and makes the following remark concerning that decision:

> "Unless the California statute differs from the usual form of these statutes, Western Fuel Co. v. Garcia, 255 Fed. 817, 167 C. C. A. 145, deciding the contrary, cannot be sustained. It is true, as the court says, that the recognized principles of the maritime law are unaffected by local legislation, at least since the recent decisions of the Supreme Court. But the right to sue for damages resulting in death is not 'a recognized principle of the maritime law', but a new right depending so far on state statutes and subject to the conditions of those statutes. Besides, there are many other instances where the 'recognized principles of maritime law' have been affected by local legislation, such as pilotage, materialmen's liens, local regulations of navigation, and a number of others."

As this Court is aware that the case of *Western Fuel Co. v. Garcia,* is now before the United States Supreme Court on the very question, among others, of the bar of the action by reason of the limitation of the state statute herein referred to, we have no doubt that this

Court will desire to postpone a reconsideration of its ruling in that case until the United States Supreme Court passes upon the questions before it and those certified to it by this Court.

We feel that this court will therefore prefer to reserve its ruling in the present case until the decision of the Supreme Court in Western Fuel Co. v. Garcia, which we understand is expected during the coming term of that court.

We will therefore not discuss this subject further until the decision of the United States Supreme Court is rendered, when, if necessary, we may request the Court to allow us the privilege of a supplementary brief in the matter.

Of course, if we are right upon this point, the libel should be dismissed, at the cost of the libelants.

Another point that we feel it encumbent upon us to call the Court's attention to, is the fact that the California statute is a so-called "Death Statute", and as the deceased in this case died on shore, and not on the vessel the action is not of maritime cognizance, and this Court has no jurisdiction.

Hughes on Adm., 2nd Ed., p. 235, Sec. 113, with authorities therein cited.

APPELLEES' POSITION.

Appellees further contend that the vessel was properly equipped, that no negligence can be attributed to them.

This appeal being a trial *de novo,* appellees expect that the Court will make its order reversing the judgment and dismissing the libel.

It is the position of the appellees:

1. That the vessel was supplied with proper slings, both rope and chain. That a Spanish burton is not any part of the equipment of the vessel, but is purely an arrangement of ropes which crews make if they want to use such an arrangement, and in the event they do not desire to do so, none is made up.

2. That the rope sling with a single turn which was being used, was in use generally in the discharge of lumber cargoes.

3. That if there was any negligence, it was that of the mate—a fellow-servant—who, it is said, laid out the slings from which the men engaged in the vessel's discharge themselves selected the tackle for discharge. Further, that the vessel being supplied as she was with chain slings, and which libelants contend are proper, the use by the mate and men of the single turn rope slings was an act of a fellow-servant for which appellees are not liable.

4. That Flynn was experienced, both as a longshoreman and mate of vessels, that he was using the slings, and if dangerous he knew it; that if warnings were given to the mate by several of the men in such a loud tone so that all could hear and the protest being disregarded, it was Flynn's duty to quit, otherwise he assumed the risk.

5. That Flynn was guilty of contributory negligence in not standing clear in response to the warning, until the load was actually deposited on the wharf.

The Evidence.

VESSEL SUPPLIED WITH PROPER AND USUAL EQUIPMENT.

That the vessel was supplied with proper and the usual equipment is manifest from the testimony.

M. J. Fitzgerald, a superintendent stevedore, who had been engaged in handling lumber exclusively for 24 years, testified:

> "Q. Assuming that you are discharging lumber of two by twelve, and in lengths from ten to twenty feet, I will ask you whether or not, it was, in 1903 usual and customary to discharge such lumber with a rope, single turn?
>
> A. Yes, they are single turn most of the time, a rope sling practically all of the time.
>
> Q. Rope sling all the time, and single turn most of the time?
>
> A. Yes, sir." (Rec. pp. 161-162.)

The same witness further testified with respect to a Spanish burton as follows:

> "Q. With regard to a Spanish burton, where lumber is discharged by means of a gaff, was it customary to use a Spanish burton?
>
> A. We didn't use them at all in those days. The only time we used a Spanish burton was when we would have a donkey on the dock and use our own gaff and put on the burton; when a vessel had a donkey, we generally used the swinging gaff." (Rec. p. 163.)

With respect to the burton, there is also the testimony of the witness *Cainan,* called by libelants.

"XQ. 92. With regard to the Spanish burton that is something that any sailor man can rig up, can he not?

A. Yes, sir.

XQ. 93. It is just a system of ropes that the sailors, when they are discharging, if they want to use a Spanish burton, rig it up and use it. If they do not want to use it, they do not, that is all?

A. Yes, sir." (Rec. p. 62.)

R. McDonald, a stevedore of over 30 years' experience in handling lumber cargoes, testified:

"Q. What have you to say in regard to the practice of slinging large lumber with a rope sling, with a single turn, as far back as 1903?

A. Well, practically in that time I don't think there were any wire slings, and they were practically all rope slings; very few chain slings.

Q. How about a single turn?

A. Sometimes they would put on a single turn, just how the case might be.

Q. When you say 'how the case might be', what do you mean?

A. Well, according to the loads, and sometimes it would be up to the men themselves, whether they would put on a single turn or a double turn." (Rec. p. 170.)

* * * * * * *

"Q. In the case of a single turn, what can you say as to the practice among stevedores of driving the sling down tight with a stick of wood?

A. You tighten up the sling before the donkeyman calls the winchman; you generally have a block and you hit the sling down.

* * * * * * *

Q. When that is done, when the sling is struck with a block so as to drive the hook down, does it spring back, or is it likely to spring back at all?

A. No; the weight is on the load then. The winchman goes ahead and the weight is on the load.

Q. And it won't spring back?

A. No. If a man understands his business, he generally puts his sling on one side, in one corner of the load, and when the winchman goes ahead the sling tightens right up in the center of the load.

Q. Explain what you mean by that. Take a square load, for instance, or a load where the corner of the lumber is, do you mean he carries the hook over to the corner of the lumber?

A. Yes, and put your sling right there, and when he goes ahead the end of the sling goes through both loops, and you have one loop right here at the corner, and when he goes ahead, by the time the sling is tightened up it is right in the center of your load.

Q. *That makes the single turn just as tight as a double one?*

A. *Yes, just as tight.*

Q. *Is that the proper way to fasten a single turn?*

A. *That is the proper way.*"

The same witness on pages 170 and 171 of the Record, was asked:

"Q. How about the use of a Spanish burton when you have a swinging gaff?

A. I never have used one. I have seen it used on ships where they didn't have a swinging gaff.

Q. But in the case where they had a swinging gaff, did they use a Spanish burton?

A. No, they never used a Spanish burton."

On direct examination, *D. W. Nilsson,* who had acted as donkeyman on the "Sophie Christenson", and who had been on that vessel for about a year, testified:

"Q. How about those slings? Were those the usual or customary slings used on board vessels?

A. They were, so far as I know.

Q. You have been in the business how long?

A. I have been in there about a year, in the lumber trade. I have been always sailing to the Hawaiian Islands before. I hardly think it was a year I was in the lumber trade when that happened."

The testimony of the same witness on cross-examination at pages 27 and 28 of the Record, shows that in addition to rope slings the vessel had chain slings which were used in loading the cargo of lumber in the discharge of which the accident occurred. The following is the testimony:

"Q. Did you always use the same kind of sling?

A. *We used a chain-sling when we took the lumber in.*

Q. Why did you use a chain-sling when you took the lumber in?

A. Well, because—I can't tell that; that is the order of the ship.

Q. You don't know why they use the rope? Did you always use a rope-sling when you unloaded the lumber?

A. We did.

Q. That was only your second trip?

A. Yes, sir.

Q. Therefore, you only unloaded the lumber once before?

A. Yes, sir; and heaved it out, too.

Q. And so that is the only time you unloaded the lumber?

A. Yes, sir.

Q. *Both times when you loaded, did you use the chain?*

A. *Yes, sir.*

Q. How many times was the chain turned around the lumber to make the sling?

A. About two fathoms were fastened to the wire, to the hook, just the same as that wire fall. They

shackeled the piece of chain, about a couple of fathoms long, and in the other end of the chain is a hook.

Q. Did the chain go around the lumber once or twice?

A. It went around the lumber once."

Charles J. Baker, the lumber tally man, called for libelants, reluctantly admits that, with respect to the single and double turn slings,—"one way was used as often as the other". (Rec. p. 123.)

Hans D. Lungvalt states, (Rec. foot of p. 181), the slings were over three fathoms, and sufficient to have made a double turn if they had seen fit. And further, at page 182,

"Most of the men when they sling a load of lumber they will put the eye on the side of the load, and when they heave it tight it tightens up itself.

Q. When you fasten it in that way, does it bind the load the same way as a double turn, or does it not?

A. Just as good, with that kind of lumber.

Cross-Examination.

Q. At the time when the 'Sophie Christenson' was discharging her lumber, only one turn, a single turn, was used on that lumber?

A. At times they used a double and at times they used a single; it was up to the men to do so."

It is therefore evident from the testimony hereinabove quoted, that the appellees had supplied the vessel with chain slings and rope slings sufficient and proper for the work in hand; that rope slings were in common use, and that the single turn was a usual method of discharge. If there is any difference of opinion between men as to which method—single or

double turn—is preferable, that should not be resolved against appellees in the exercise of their honest judgment in using one of two usual methods. It can hardly be said to be negligence.

As to the complaint that the vessel was not supplied with a Spanish burton, it appears that this is no part of a ship's equipment, but is something always available to the sailor, which he rigs up if he wants it, and does not, if he does not desire to. It is only an arrangement made of available rope on the vessel. Furthermore, it was not used in 1903 at all, where the ship, as in this instance, had a donkey.

CONTRIBUTORY NEGLIGENCE.

If it be held that there was negligence on the part of appellees, there can be no doubt that Flynn was guilty of contributory negligence.

The Court in its decision remarked that

> "The general nature of such hazards as are incident to the use of a single turn, was well known, and injury could have been avoided by the exercise of a proper degree of precaution. That is, there was but a single peril, the *slipping of timbers from the load*, and manifestly workmen could protect themselves by standing back when the load began to rise and remaining back or keeping a lookout until it was *actually deposited* on the wharf. It is not a case where in using an appliance, known by him to be defective, a workman is subjected to a peril which it is impossible for him to escape. The view must be taken that the deceased knew quite as well as his superiors of the kind of perils attending the use of the different forms of slings and it

> was his duty to exercise care commensurate with the degree of peril. It was possible for him to be on guard until the load swung onto the wharf in harmony with the practice followed by some of his fellow-employees, and realizing, as he must have done, that the timbers were likely to slip out of the load, it was incumbent upon him in the exercise of due care, to keep a lookout until danger was past." (Rec. p. 189.)

In criticism of the Court's determination that the deceased was guilty of contributory negligence, proctor for libelants resorts to a fine-drawn effort. He says that

> "after the load swung on to the wharf it was not expected to return to the vessel. Clearly the deceased had then a right to expect that the load would not swing back from the wharf to the deck of the vessel".

In point of fact, the load never was landed on the wharf. It struck the stringer, and therefore had not entirely cleared the vessel. (*Cainan*, Rec. p. 46, qq. 55, 56.) The wharf was higher than the vessel. (*Cainan*, Rec. p. 47, qq. 71, 72.) (*Ehlert*, Rec. p. 78, q. 50.)

> "When the load came back, [was lowered away] it hit the stringer on the wharf because the ship was lower than the stringer, and it shook it, and half of it fell out between the ship's side."

That timbers do habitually slip from the load, regardless of the nature of the sling used, is practically the testimony of all the witnesses, and it is little comfort to feel that the injury might have been caused by a short, rather than a long, timber, as is intimated by the suggestion that the falling of long timber is not to be

expected. When there is slipping of the load, it is common sense that there is great danger at all times. Once a part of the load goes, the whole of it may go, and in fact it did.

It was the duty of the deceased to "exercise due care, to keep a lookout until danger was past", and that he did not do so is borne out by the evidence.

WELL RECOGNIZED HAZARD—THE ASSUMPTION OF THE RISK.

Concerning the well-recognized danger of the slipping of the load regardless of the nature of the sling used, the witnesses have this to say:

> "XQ. 107. When this was swung over, what were you doing?
>
> A. I was looking at it. We generally look to see that it goes clear of the ship. We don't like to see pieces falling out there every time." (*Cainan,* Rec. p. 64.)

> "Q. I will ask you in your experience whether it is a common and ordinary experience—I will put it stronger than that, whether it was not an every-day experience in discharging cargoes of lumber, for the lumber to fall out of the sling, no matter what kind of a sling you used?
>
> A. Yes; an every-day occurrence.
>
> * * * * * * *
>
> Q. Whether you use a single turn, a double turn, a wire sling, or a chain, I am asking you whether or not that is an ordinary occurrence, no matter what kind of a sling you use?
>
> A. Sure; no matter what we use, it happens every day, lumber falls down.
>
> Q. Has that been constant, in your experience?

A. Yes; whether we are using wire, or chain, or rope; it is an every-day occurrence with us.

Q. It is one of the ordinary risks, isn't it?

A. Yes; one of the ordinary risks." (*Fitzgerald,* Rec. p. 163.)

"A. I said that the lumber will slide at any time, with any kind of sling, from the middle of the load.

Q. With any kind of a sling?

A. Yes, with any kind of a sling, it will slip out of the middle of the load if there are some small sizes in it.

Q. Didn't you tell me that that was your daily experience during the twenty years—almost daily?

A. Yes, sir.

Q. It is one of the ordinary risks you take?

A. Yes, you are looking for it all the time." (*McPhee,* Rec. p. 179.)

The hazard attached to their occupation was well known, and furthermore, all engaged on the ship were men of experience in stevedoring work, and Flynn in particular, had been a mate of vessels, as well as a stevedore. If there was any more hazard attached to the use of a single turn than follows the use of a double turn, Flynn and those engaged with him knew it.

If the testimony of *Ehlert* and *Cainan* is to be credited, they knew of the hazard, and so did the other men.

Cainan says, in response to the question:

"Had you spoken to anybody about this rope before the accident happened?

We spoke on account of our own safety. I spoke to the mate about it, and so did the other men." (Rec. p. 49.)

"He spoke to the mate about it and to no one else." (Rec. p. 61.)

Ehlert says, (Rec. p. 79):

> "Q. 56. Before this accident happened, did you complain to any of the officers of the ship with regard to the sling that they were using?
>
> A. Yes, sir, I did.
>
> Q. 57. To whom?
>
> A. To the mate. * * * There was lumber fell out the day before. I told him that somebody would get killed here yet with the slings."

It is the testimony of *Woodson* (Rec. pp. 152, 153), that a conversation was held between Buckley, the foreman of the lumber company, and the mate right alongside the stringer (Woodson says the master, but it is apparent from Buckley's testimony it was the mate) while Flynn was on the dock, in a loud tone, loud enough for everybody to hear, complaining of the slings.

> "Q. Everybody, then, was warned that it was dangerous and they were all keeping out of the way?
>
> A. I was, I don't know that the others were.
>
> Q. Well, they were all warned, weren't they, by that conversation that it was dangerous?
>
> A. They ought to have been."

So it is apparent, that not only the nature of the hazards attached to the use of slings generally, were known to all, but it is also in evidence that all were warned by the protests made to the mate, as to any particular hazard of the single turn.

It was therefore the duty of Flynn to at least use due care to keep a lookout until the load was *actually landed*—to "exercise care commensurate with the de-

gree of peril", and the Court found that he failed in this.

In addition, it was his duty to quit the work when the protests were disregarded by the mate, otherwise he assumed the risk.

Upon the question of *contributory negligence,* and also of the assumption of the risk, the case of

The Scandinavia, 156 Fed. 403, is in point. Libelant in that case was using a ladder, which was broken off at one end, so that when the end was put down it was likely to fall, but could be safely used by putting the other end down. The libelant's attention had been called to the condition of the ladder, and he was advised of the proper manner of using it. He went on shore one evening, using the ladder, which he left on the wharf, and on his return, placed the same with the broken end down, and it fell with him, causing him injury.

It was held that he assumed the risk of using the ladder in its known condition, and that his injury was due to his own want of care. As the opinion states, the fault of the libelant was substantially admitted by his proctor,

> "who contends that he was guilty merely of contributory negligence; that the initial fault was that of the claimant, in that it did not furnish to its servant a suitable instrument for his use; that the libelant did not intelligently and distinctly assume the risk of using the defective ladder; that he is not shown to have fully appreciated the dangers of using it; that such dangers were not fully explained to him, or brought clearly before him, although he was warned of the defect; and that at the time of the injury he did not have in mind the condition of

> the ladder, and so used it and was injured. The libelant invokes the authorities that, before a servant can be held to have *assumed a risk,* he must be shown to have *understood and appreciated* the nature of it. He further urges with great earnestness that he was a seaman; that the ladder was one of the furnishings of the ship; that his duty as a seaman made it incumbent upon him to follow the orders of the master, and to use such appliances as were given him; that a seaman cannot leave the ship, but must obey orders, and use such things as are placed in his hands by the master".

The Court comes to the conclusion that it cannot sustain these contentions, because it was shown that the libelant knew the condition of the ladder, and that he acted upon such knowledge; that he was familiar with its customary use. And as a consequence, the Court held that he had assumed the risk.

The Court also stated that it was unnecessary to decide whether or not the libelant was a seaman, as the boat upon which he was engaged was not in operation, and

> "There was nothing to prevent him from leaving the employment. If the ship, or any of its tackle and apparel, did not suit him he was at liberty to leave at any moment. The familiar law with respect to the duty of a seaman to obey the orders of the master has no application here; for the libelant was not at sea. He was under no captain. The case shows that his employment was not such as to make it incumbent upon him to remain upon the ship for a moment longer than he desired." (p. 406.)

After quoting a number of leading cases on the question of the assumption of risk the Court comes

finally to the conclusion that after a study of the uncontradicted facts, and an application of the well-known principles of maritime law, the fault was entirely upon the part of the libelant.

> "He was not placed by his employer in a position of undisclosed danger. He was not dealing with complicated machinery. He knew whatever defect existed in the ladder. * * * if he had taken care, he could have used the appliance safely. He knew the ladder better than any one else, and assumed the risks of its use. His negligence was the immediate and proximate cause of the injury."

The libel was accordingly dismissed.

So, as we have said, in the case at bar, not only were the nature of the hazards attached to the use of slings generally, both single and double turn, known to the deceased, but everybody had been warned by the protests said to have been made to the mate concerning the same.

Flynn was in the same position as the libelant in the case above quoted.

He was not a seaman. While he was working with the crew, and a fellow-servant of the mate, nevertheless not being signed on the vessel, it was not "incumbent upon him to remain upon the ship for a moment longer than he desired".

Another case of strength in this connection, is that of *The Serapis*, 51 Fed. 91, where at page 93 the Court remarks:

> "Now, the question is whether the owners of the steamship Serapis can be called negligent because they had on board the steamer a winch which had

> been there for six years, in continual use, was in perfect order, but required more care on the part of the person who worked it than some more modern machines of the kind. And this, too, when the machine was well known to the employe, and that it required somewhat more attention on his part than other machines fitted for similar use. We are of opinion that where a workman is employed to do certain work with a machine which he fully understands, though it may not be of the newest pattern, but nevertheless is in perfect order of its kind, and may require more care than newer patterns, *he takes the risk of all accidents which may befall him in its use.* And if, as is the fact in this case, he did not exercise the care required, he must suffer the consequence of his negligence. This libelant's misfortune has our deepest sympathy, but to do injustice through sympathy for the injured is to do away with law, and make recovery for loss dependent on the tenderness or want of it in the feelings of the court. We think the decree of the district court in this case should be reversed; and it is so ordered."

The similarity of the case above quoted from with the instant case, is marked.

It is undisputed that rope slings were in common use, and that a single turn, in the discharge of lumber cargoes, was usual. The deceased was an experienced stevedore, and knew of the hazards of the slipping from the slings of both double and single turn, and was aware of the protests said to have been made to the mate on the use of the single turn. The sling was therefore "well known to the employee", and he also knew "that it required somewhat more attention on his part than other" slings "fitted for similar use".

The remark of the court in *The Serapis* case is peculiarly applicable, when we consider its statement that

> "We are of opinion that where a workman is employed to do certain work with a machine which he fully understands, though it may not be of the newest pattern, but nevertheless is in perfect order of its kind, and may require more care than newer patterns, he takes the risk of all accidents which may befall him in its use."

The most potent evidence of the knowledge of the deceased of the hazard of the slipping of slings, is his act in stepping back, in conjunction with others of the stevedores, when the load arose, and his contributory negligence occurred when he stepped forward from his place of safety before the load was actually landed.

Finally, in the case of *The Wilhelmina*, 232 Fed. 430, a stevedore, injured while stowing cargo by the slipping of a defective winch, was charged with contributory negligence, where he remained on the work with knowledge that the winch was defective and dangerous, although on the occasion of the injury he did all he could to protect himself.

The Appellate Court, on the subject of the fault of the libelant, states:

> "The court below found the libelant to be at fault himself, and reduced his damages for that reason, and this is complained of by the appellee. The libelant's testimony was to the effect that the winch had been slipping during the morning and prior to the accident, and that complaint had been made by the foreman to the officers of the ship to that effect. It seems reasonably free from doubt

that the libelant was informed of the condition of the winch and knew the probable danger to him consequent upon it. He seems to have protected himself to the best of his ability from the descending load at the time of the accident, and no fault is to be attributed to him in that respect. He, however, continued to work in a place of danger, after realizing the peril of so doing. While, as between him and the appellant, there could be no assumption of risk, [this is because as the court previously remarked, 'he was not the employe of claimant'] he might still have been guilty of contributory negligence in remaining at work, when the conditions were such that a reasonably prudent man would not have done so. This was the conclusion reached by the District Judge, and we agree with it."

THE ACCIDENT, AND FLYNN'S CONTRIBUTORY NEGLIGENCE.

The testimony of *Lungvalt,* the master, recites the accident as follows:

"Q. Did you see the accident?

A. I did.

Q. What happened—tell us how the accident happened.

A. I came along from aft and was going forward. I was going to talk to the steward; I was going to tell him to bring me some breakfast; it was about ten or fifteen minutes after eight o'clock in the morning; when I came forward *they were heaving a load up out of the hold, and the load started to slip;* there were a couple of planks slipped out of the load 12 by 12, and I suppose 20 pieces in it. I seen the pieces start to slip out, and I said to everybody, 'Get out of the way, get out of the way.'

And everybody was out of the way, all walked away, and the load swung in to the wharf. When it came in to the wharf the donkeyman didn't let it go; he could have let it go, but he kind of held on,

> and the load swung back and one plank slipped out again and it stood on end; Mr. Flynn, the man that got hurt, had gone back, he was warned to get away and he was away, he was between the poop and the mizzenmast, but he went back again; nobody told him to go back; he went back on his own account, and this plank fell out and hit him on top of the head." (Rec. p. 180.)

Part of the foregoing testimony is printed in appellant's brief on page 10, without indicating the omissions which they have made in the testimony. Reading the testimony, including that omitted by appellant, it is apparent that the men were all warned of a slipping load—slipping while it was being hoisted above the deck —a dangerous load—as Nillson puts it, and they got out of the way. Then when it swung in to the wharf the donkeyman didn't let go, and as the testimony of Cainan shows. (P. 46.)

It struck the stringer of the wharf. Warned that this was a dangerous, slipping load, Flynn failed to watch it, to keep a lookout—he failed to do what appears from appellant's brief page 10 he should have done—look after it *"until it is clear or gets landed"*. And it never was clear, for it struck the stringer on the edge of the wharf and it never was landed because it fell into the water, and on the deck.

It is evident that Flynn's fellow-employes recognized that danger, for his crew alone came forward before the danger was past. As the Court said:

> "It was possible for him to be on guard until the load swung on to the wharf in harmony with the practice followed by some of his fellow-employees, and realizing as he must have done, that the timbers

> were likely to slip out of the load, it was incumbent upon him in the exercise of due care, to keep a lookout until danger was past."

The inaccuracy of the recitation of the circumstances surrounding the accident as set forth in appellant's brief lies in the assumption that the load swung on the wharf and was landed—that the danger was past. In fact it is shown that the danger was ever present, that all knew it, that the load rose—a dangerous load—and striking the stringer before landing, fell out.

Appellees are criticised because after *seventeen years* they are not able to bring the mate as a witness. The appellees were warranted in believing the action had been abandoned after so long a period of inaction. And in matter of fact, proctor for libelants himself by letter stated that he had forgotten this old case. In the trial of causes it is preferable that the testimony be taken in open Court, but appellees were not so fortunate as to be able to locate the mate after so long a lapse of time. We think the Court will appreciate the injustice of the criticism and the difficulty of locating seafaring men after so many years, and especially since the World War.

We also wish to but add a word to the suggestion in the brief that the Spanish burton should have been supplied by the ship and the lack of its contributed to the accident. It is only necessary to say that appellants' own witness testified that the burton is no part of the ship's equipment, and is made up of rope by the sailors themselves if they choose to use it. Further, there

is the evidence of Fitzgerald and others that the burton was never used when the ship had a donkey.

It is said that Flynn was engaged in the performance of a hazardous duty imposed upon him by his employers. Appellants lose sight of the fact that he was not a member of the ship's crew, but was a stevedore, and one who, as the Courts say, in speaking of the assuming of the risk by the employe, was a free agent to accept or decline risks of which he is aware.

IF THERE WAS NEGLIGENCE, IT WAS THAT OF A FELLOW-SERVANT—THE MATE.

The relationship between the mate and Flynn is testified to by Buckley. (Rec. pp. 137, 138.)

> "Q. Mr. Butler, was Mr. Flynn working for you at the time?
>
> A. No, working for the vessel.
>
> Q. Who was his foreman?
>
> A. The mate or captain usually hired the men on the boat that were doing what they call longshoreman work.
>
> Q. Then really the mate was his foreman at that time?
>
> A. Yes, sir.
>
> Q. And he was working now—his part of the work of discharging the vessel—just the same as a member of the crew would be working?
>
> A. Yes, sir.
>
> Q. In other words—the longshoreman who goes on board to discharge is in the same relation to the mate as a member of the crew is in discharging?
>
> A. That is my opinion."

Ehlert testifies, (Rec. p. 93):

"XQ. 128.

A. That is all. He was taking the second mate's place. The second mate was supposed to work lumber in those ships. The second mate was made mate.

XQ. 129. And Flynn was working about two days and a half when this accident happened?

A. Two days and a half, longshoreman.

XQ. 130. He was not a member of the crew?

A. No, sir, he was not a member of the crew."

Cainan's testimony on page 67 of the Record, shows that the mate gave directions with regard to the tackle to be used in discharging.

"Re-D. Q. 6. Who would give directions with regard to the gear and tackle to be used in discharging?

A. The mate looked out for that."

Cainan, Rec. p. 43:

"Q. 24. The mate was giving orders?

A. Yes, sir."

P. 61,

"XQ. 83. When was it you say you spoke to some one about the sling?

A. I suppose about as soon as we started to work.

XQ. Whom did you speak to?

A. I spoke to the mate about it.

XQ. To no one else?

A. No, sir, to no one else."

Baker, Rec. p. 118:

"Q. In other words, it is the mate's business to superintend the discharge?

A. Yes, and they always do.

Q. The mate was in charge at this time, was he not?

A. Yes."

The Courts in this jurisdiction have so often held that the mate of a vessel is a fellow-servant with a member of her crew or with a stevedore who is himself in the employ of the vessel, that authority to this point is unnecessary. It is, however, necessary and proper to point out that the accident herein complained of occurred in 1903, twelve years previous to the Act of March 4, 1915, known as the "Seaman's Act", which provides that seamen having command shall not be held to be fellow-servants with those under their authority. The act not being in existence the law that the mate is a fellow-servant with the crew was at the time of the accident undisturbed.

In discussing the acts of the mate as a fellow-servant, we do not overlook the remark of the Court that it was the non-delegable duty of the respondents to take reasonable care in providing safe appliances for carrying on the work. But this they had done, when they provided slings which were usual in the discharge of lumber ships. There was available for use on the vessel both the usual rope and chain slings, and all that it was in the power of appellees to do had been done. If they were to do anything further it necessitated the vessel owner traveling on the ship as a sort of supercargo, and each time of discharge or loading, to personally cut the rope for the slings in proper lengths and assign the tackle to the crew engaged in the work if there was a choice between chain or rope slings. In the

very nature of things, the assignment, cutting the rope and making up of the tackle for discharge, must be left to the proper officer of the ship, who is the mate. If the mate selects from suitable equipment that which is not, it cannot be said to be other than the negligence of the fellow-servant.

It is the testimony that it was the duty of the mate to give directions with respect to the gear and tackle to be used in discharging. As Cainan said, "the mate looked out for that". He was further giving orders and had charge of the whole matter of the discharge. Protest is said to have been made to him concerning the slings, which he disregarded. We feel that it is evident that if there was any negligence, it was that of a fellow-servant, for which, under the law, appellees are not liable. That Flynn was the fellow-servant of the mate, is clearly of record in the testimony of Buckley, where he states that Flynn was working for the vessel, and the mate was his foreman; that Flynn was working just the same as any member of the crew would be working.

So too, if it is true that proper warning was not given of the risk, it was the duty of the mate to give that warning. (Nilsson, p. 37.)

> "Q. It is the duty of the mate to watch the load and sing out if there is any danger?
>
> A. Yes, sir. He did watch it, he watches every load that goes out, and takes hold of the load and swings it over the rail.
>
> Q. It is the duty of the mate to watch it and warn them of the danger?
>
> A. Yes, sir."

Further, if a burton was necessary to guide the load, all that was necessary to do was for the sailors to rig it up. It was not, as we have seen, any part of the ship's equipment.

THE DAMAGES CLAIMED TO HAVE BEEN SUFFERED BY LIBELANTS.

As is apparent, appellees do not consider there is any liability at all attaching to them.

However, we follow the brief of the libelants somewhat in the order in which the matters are therein presented, and we now come to the loss which they claim to have suffered.

Proctor for libelant states, that the original decision of the Court was modified without any new evidence having been presented in the interval, and indicates that he does not feel that the modified judgment is adequate.

What actually occurred, and what occasioned the modification of the judgment, was that the Court had called to its notice the fact that the accident for which the damages are claimed, occurred seventeen years prior to the trial of the cause, and as a consequence thereof, felt bound to measure the damages as of the time of its occurrence, and not as of a time when conditions had become greatly changed, and were in fact abnormal.

The Court had before it the case of *Chesapeake & Ohio R. Co. v. Addie Kelly*, 241 U. S. 485, which is of definite value on the subject of damages. The decision in that case is,

The measure of damages for death is the present cash value of the future benefits of which the beneficiaries were deprived, and not an aggregate sum based upon his probable earnings for the rest of his life.

This is coupled with the suggestion that,

One seeking to recover damages for the wrongful act of another, must do that which a reasonable man would do under the circumstances to limit the amount of the damages.

The verdict was for $19,011.00, which was apportioned among the widow and infant children of the deceased.

The appeal was based upon the refusal of the trial court to give an instruction embodying the above principle.

The judgment was reversed by the Supreme Court.

The rule thus stated finally disposes of the question of damages in the present case, and places beyond question the fact that the damages contended for by appellants are grossly excessive for a man 42 years of age, engaged in intermittent work at $4.50 a day, and at other times at $75.00 a month.

In this connection, also, we desire to call attention to the suggestion of the Supreme Court of the application to a case of this kind of the principle that,

One seeking to recover damages for the wrongful act of another, must do that which a reasonable man would do under the circumstances to limit the amount of the damages, and suggest its application to the fact that

it is now 17 years since the accident occurred. The libelant is the moving party, and failed to bring the action to trial during that period. It is elementary that he should not be permitted to gain by his own negligence.

The 17 years, therefore, should not be permitted to be the basis of any increase in the award. The "present cash value" referred to in the decision, is the "cash value" at the time of death. The fact that libelants failed to reduce their claim to a judgment within a reasonable time after the accident, should not be allowed to increase the amount of the judgment. That is libelant's fault, and the burden should not be placed upon the respondents.

Further cases as to the measure of damages follow.

In the case of *Farmers Loan & Trust Co. v. "Toledo"*, damages fixed by the master were reduced by the Court.

> "The question, however, about which I have been more perplexed, is the amount of damages awarded by the master. He has given the basis upon which that award was made. The earning capacity of these two men was shown. Their probable future life was established by the annuity tables, and the master, giving due allowance for the extra hazard to life because of the nature of the employments of the deceased, made his calculation, and allowed to Cassie Alberts the sum of $9,935, and to Ida Beaulieu the sum of $11,606. It is evident in this estimate that the master has given to these petitioners the full benefit of all the probable years of life before them, and the full benefit of their present maximum earning capacity. One of the most difficult questions for a court to determine is a correct and just measure of damages in a case of this

kind. It is hard to say that a human life is not worth such a sum as the master has given on this case, because the record shows these men were men of excellent habits, fond and affectionate husbands, and in every way a help and comfort to their families and useful to the public, and it is with great reluctance that I interfere in any way with this award. But in a large number of states where the limit for the loss of life has been fixed by legislation the sum of $10,000 has been fixed as the maximum allowance to be made. This is a legislative construction of a fair maximum sum to be awarded in such cases. I think the court may properly, therefore, accept this concurrent judgment of so many different state legislatures as justifying it in saying that the maximum ought not in any one of these cases to exceed that sum. So that, if the petitioner, Ida Beaulieu will remit sufficient of the award made to her to reduce it to the sum of $10,000, and if the petitioner Cassie Alberts will remit sufficient of the award made to her to reduce it to $8,500, the court will then approve an award to that amount, and order the receiver to pay the same."

Hall v. North Pacific R. R. Co., 134 Fed. 309, De Haven, J. Deceased was between 52 and 53 years of age, and had been living with his family, consisting of himself and seven children.

The Court allowed $5000.

Felt v. Puget Sound Electric Ry., 175 Fed. 477, Van Fleet, D. J., sitting in the Circuit Court, Western Division of Washington.

This was a motion for a new trial, on the ground that the damages awarded by the verdict are excessive.

(Syl. 4.) "Decedent, a stone mason by trade, 47 years old, and in good health, with ability to

> earn wages at from $6.00 to $6.50 per day, was killed when attempting to alight from defendant's moving electric car. He was a kind, affectionate father, and devoted most of his earnings to the support of his family. There was no evidence as to his habits of industry or sobriety, except that on the day he was killed there was evidence that he had spent the afternoon with a companion in a saloon playing cards and pool, and that, after they boarded the train, they were seen by fellow passengers drinking from a bottle. HELD, that a verdict for $10,000 was excessive, and should be reduced to $6000."

The facts regarding earning ability are better than the facts now before the Court, and Judge Van Fleet referred to the fact that the trial Court had before it all the witnesses and instruments of evidence at first hand; all he [Judge Van Fleet] had, was an inadequate record; and also that the trial Court denied a motion for new trial, and that every intendment and implication must be indulged in to support the judgment. And proceeded:

> "Having these principles in mind and with due regard for the considerations flowing therefrom which should cause the court to hesitate in the premises, it seems to me that in view of the very meager showing on the subject of the deceased's earning ability and the other elements properly to be considered in estimating the damage suffered by the plaintiff, and considering that phase of the case alone, there is no escape from the conviction that in making the large award it did the jury ignored or went outside the evidence in the case. By no conceivable mode of just computation under the rule as to the measure of damages submitted to it could the jury have reached so large a result upon the facts before it. While, as stated, the evi-

> dence in this respect was uncontradicted, it left the deceased's earning capacity as based upon his habits of industry essentially lacking in certainty; and I know of no rule which will permit the jury to roam the field of conjecture or draw upon their imaginations for facts not disclosed by the evidence. It is said in effect that, conceding the lack in this respect, the jury were entitled to consider the loss of deceased's society, protection and guidance, which is in its nature of uncertain value. But, while this is an element of loss, it is only its pecuniary, and not its sentimental, value; and it must have a limitation within reason as based upon the evidence. In that respect likewise the evidence was lacking in definite substance. The only evidence bearing upon the subject of deceased's personal habits related to the incidents of the day of the accident, and that, it is sufficient to say, was not of a character to justly influence the jury to so large a verdict."

The Saginaw and the Hamilton, 139 Fed. 906. This is a case of exceptions to commissioner's report.

The matter was referred to a commissioner, who reported damages for eight different persons that were deceased.

In his report he stated the rule taken from the Delaware reports as to the assessment of damages (p. 909), and gave a large number of citations with respect to the rule of the Federal Courts.

The District Court reviewed his findings, and upon the subject of

Mortality Tables, as a means of determining damages, quotes from a decision of Judge Simington, who said he had

no confidence in such tables. The Court then modifies the conclusions of the Commissioner with respect to said claims, reducing them considerably:

1. $3500.00;
2. 7500.00;
3. 4500.00;
4. 4250.00;
5. 2500.00;
6. 4250.00;
7. 3500.00;
8. 750.00.

Ages:

1. 18 years;
2. 60 "
3. 40 "
4. 42 "
5. 53 "
6. 35 "
7. 16 "
8. 1 month.

Yearly wages:

1. $360.00;
2. 924.00;
3. 624.00;
4. 600.00;
5. 324.00;
6. 550.00.

Reduced by the Court to

1. $2,000.00;
2. 6,000.00;
3. 3,000.00;
4. 2,750.00;
5. 1,500.00;
6. 3,000.00;
7. 2,000.00;
8. 400.00.

On appeal to the Circuit Court of Appeals, 146 Fed. 724, one of the questions submitted was, shall the awards made by the Court be increased, or reduced, and the Circuit Court of Appeals said:

"That the amounts allowed by the final decree do substantial justice to the claimants."

Humboldt Lumber Manufacturers' Association v. Christopherson, 73 Fed. 239, C. C. A., 9th Cir.

Syl. "4. Damages.—$7,000 and $5,000, respectively, held, not excessive awards by the court of admiralty for the death by drowning of the master and cook of a schooner, they being in good health at the time, and earning wages of $100 and $50 per month, respectively; the master being 35 and the cook 39 years old."

State of Maryland v. Hamburg-American Steam Packet Co., 190 Fed. 240.

The deceased was 40 years of age. Left a wife and five children, the eldest of whom was 16, and the youngest 3 years. He earned about $10 a week.

"An allowance of $4,500 to his widow and children in the aggregate would be fair and reasonable."

Affirmed on appeal.

Cheatham v. Red River Line, 56 Fed. 248.

Father 38 years of age, children 6 months, 2½ and 5 years old. Earned the wages of a deck hand. Had been in the habit of devoting all of his wages to the support of his children, to pay for their subsistence and rent, per month, $16.50, besides providing for their clothes.

Damages allowed, $2,500.

The observations of the Court on the method of fixing the damages at $2,500 are cogent. He points, among other things, to the fact that many states limit

the recovery to $5,000, and the only act of Congress authorizing a recovery in case of death fixes the limit of damages at $5,000.

Boden v. Demwolf, 56 Fed. 846. (Syl.)

"Under a libel to recover for the wrongful death of a stevedore's employe, it appeared that deceased was about 50 years old, had a wife and 4 children, and received 50 cents an hour when he worked, but there was nothing further to show the amount of his earnings. Held, that $1,500 should be awarded to the next of kin."

In re California Nav. & Imp. Co., 110 Fed. 670.

The question of damages is treated on page 675 to 677. In this case, the judge reviews and states the principles applicable in this state, and under the state statute, where only the direct pecuniary loss to the heirs can be recovered. The uncertainty of his future state of health and ability to labor or to secure constant employment at the present rate of wages, must be allowed due weight.

Damages allowed to three separate administrators of three deceased parties, as follows:

One, $3,000.00; one, $5,000.00; one, $2.750.00.

St. Louis Iron Mountain & So. Ry. Co v. Craft, 115 Ark. 483.

Here a man was mangled by a railway train, and his suffering and anguish before death was a subject for consideration.

A jury allowed $11,000 to the administrator, and the Supreme Court reduced it to $5,000.

The matter went to the Supreme Court of the United States, 237 U. S. 648, and that Court said that the award of $5,000 as damages for pain and suffering *does seem large,* but the question of excessive damages was not open for reconsideration in that Court. (p. 661.)

By the foregoing, we think the Court is placed in possession of some of the decisions in this very jurisdiction, which, under the circumstances, ought to control. We have also referred to decisions of other Federal Courts, both District and Circuit Court of Appeals, which we think give a fair idea of the principles to be applied in an admiralty cause, and of the disposition of the Courts generally with respect to damages to be allowed.

We respectfully submit, with respect to the question of damages, that under all the facts of this case, and the principles announced by the Court in its opinion, $2,500.00 would be a large award. But, as indicated, our position in this matter is, that the cause being a trial de novo, the Court, recognizing that the appellees herein are not liable for the accident which occurred, will render its judgment ordering the dismissal of the libel.

IF THERE BE ANY LIABILITY, THE PART OWNERS (EXCEPT THOSE AS TO WHOM THE ACTION HAS ABATED BY REASON OF DEATH) ARE LIABLE ONLY TO THE EXTENT OF THEIR PROPORTIONATE INTEREST IN THE VESSSL.

Appellants' next claim that the decree of the lower Court should have been for the full amount of the damages against each of the respondents in solido.

The complete answer to this contention is contained in section 18 of the Act of June 26, 1884, Comp. Stat. Sec. 8028, and is as follows:

> "The individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities *that his individual share of the vessel bears to the whole;*"

It is held in the case of *Richardson v. Harmon,* 222 U. S. 96, 56, L. Ed. 110, that part owners are liable only to the extent of their proportionate interest in the vessel, for a tort.

So, when the lower Court directed that the decree be against each of the respondents severally, for his proportionate share, the decree was in accordance with the statute with respect to limited liability, and with the decision of the United States Supreme Court above referred to. No further authority for this is required than the statute as interpreted by the Supreme Court.

The statement of the appellants to the effect that each respondent is liable for the whole amount of the damages, is without foundation. The evidence amply shows there is no negligence attaching to them, and if there was any negligence, it is alone that of the fellow-servant, for which, in law they are not liable.

Furthermore, there is no proof as to any knowledge on the part of the respondents of the methods used in the discharge of the cargo, and before any suggestion of liability can be attached to them, actual knowledge of the alleged negligent methods must be shown to have existed.

As we have repeatedly said, the evidence shows that the vessel was furnished with rope and chain slings, and that the making of the slings, and the selection of the tackle, was with the mate, who, in this particular case, made them from new rope. If he cut them too short for two round turns, it is not the personal negligence of any of the respondents.

The Court will see by an examination of the testimony of Buckley and Baker that the matter of preparing the slings was in the mate's charge, and that he was the foreman. So far as the protests are concerned, they were made, if at all, to the mate, and to no one else. There is no evidence connecting any one of the respondents with any of such protests, and the master denies ever having been spoken to about it. Cainan and Ehlert both say they spoke to the mate for their own safety, and to no other men, and that they picked the slings out themselves, and made up the load to such size as they saw fit. Buckley was uncertain whether he spoke to the mate or master, but when he states the man's name was *Hansen* it is evident that it could not have been *Lungvaldt,* the master.

The next position taken by the appellants is, that, assuming each of the respondents against whom the decree was rendered was entitled to the limitation, the decree should be against each individual for their proportion of the full amount of the damages which his individual share in the vessel bears to the whole of the shares liable. In other words, it is their proposition, that the deceased part-owners pay nothing, and that the

living part-owners pay the whole award, subject to the provisions of the limitation act.

The proposition hardly requires reply.

The liability was fixed at the time of the accident, and all parties were living, and it is not increased by the subsequent death of some of the part-owners.

THE MASTER AND E. A. CHRISTENSON.

Finally, as a fifth proposition, the appellants contend that if the award of the Court below be affirmed, the decree should be against each of the respondents above named for the full amount. This, on the assumption that if there was negligence, it was due to the personal act or neglect of these respondents.

In an effort to establish this proposition, appellants obtained the permission of this Court to take further testimony, and as the result thereof took the deposition of Mr. E. A. Christenson. It developed from his testimony, that on March 3, 1903, he ceased to have any interest whatsoever in the schooner "Sophie Christenson", and as a consequence, ceased to be the managing owner. So that the statement in appellants' brief that the argument as to Christenson's responsibility applies perhaps with less force than that as to the master, has some cogency. On page 2 of his deposition, Mr. Christenson is asked:

> "Q. What interest did you have, Mr. Christenson, in the 'Sophie Christenson' on August 3, 1903?
> A. None.

Q. Did you have any interest in her before August, 1903? A. Yes.

Q. What interest? A. Two-thirty-seconds.

Q. A two-thirty-seconds interest? A. Yes.

Q. When did you dispose of that?

A. I disposed of 1/32 on January 8, 1902, and 1/32 on March 3, 1903."

And on page 4:

"Q. Who was the managing owner of the 'Sophie Christenson' on August 3, 1903?

A. I don't know.

Q. There was a managing owner, was there not?

A. Not according to the records, and that is all I have to go by.

Q. Did you refresh your memory by the records in the Custom House before you came here today?

A. Yesterday.

Q. When, if at all, were you the managing owner of the 'Sophie Christenson'?

A. Up until March 3, 1903.

Q. According to your ideas, you ceased to be managing owner on what date?

A. March 3, 1903.

Q. Why?

A. Because I had no further interest in the ship."

It thus develops that Mr. Christenson was improperly made a defendant in the action, and while being a defendant, it was proper for him to sign the answer, it was an inadvertence, as he testified, for him to sign for so-called co-owners.

Not being managing owner, and in fact not being an owner at all, there can be no liability on his part and the discussion of that subject by appellants is out of place.

As to the master, it is said that the testimony shows that the slings for the discharge, were provided by him, and to substantiate this assertion, a quotation is had from the testimony of Ehlert—pure hearsay, and which was objected to on that ground—to the effect that the mate told him that when they were making the slings, he told the captain they were too short.

In addition to the fact that the testimony is hearsay, it is emphatically denied by the master, who, on being questioned testified:

> "Q. Did Mr. Buckley, or anybody else, come to you to make a protest about using a single turn rope? A. No, sir. No, sir."

Again, quotation is had from the testimony of Buckley, to the effect that he spoke either to the master or to the mate, protesting against the use of one turn.

That he did not speak to the master, and that if he spoke to anybody it was the mate, is evident from Buckley's further testimony (Rec. p. 132), where he says:

> "Q. Who did you ask that?
> A. Either the mate or the captain. This is so long ago it has gotten out of my head, but I asked some one there—the mate or the captain—Captain *Hansen.*"

The name "*Hansen*" is omitted from the quotation on page 22 in appellants' brief, but it is the earmark that indicates that he did not speak to the master, as the name of "*Lunvaldt*" or "*Lungvalt*"—however it may be spelled—is not likely to lie in the mind of the witness as "*Hansen.*"

So, it is probable, that if Buckley in fact spoke to any one, it was to the mate, and it was to him that Woodson heard Buckley speaking.

Though the master is not in any way connected with the furnishing of the slings, and had no part in the supervision of the discharge, the appellants content themselves with his confirmation of other witnesses, which was to the effect that rope slings, with a single turn, were in 1903 in general and usual use. He expressed his opinion that this usual use of the single turn was proper for the kind of lumber which was being discharged by the vessel, and stated that if he were sending up a load of large lumber he would use a single turn.

How any fault can be found with this, or how an alleged personal negligence can be made out of it, we cannot understand. It is candid, the method referred to is testified to by other witnesses as usual, and it is an expression of opinion many years after the accident in question.

Neither is the criticism of the master justified, with respect to his testimony concerning his having no interest whatsoever in this litigation. He testified in April, 1920, and it is not only possible that he disposed of his interest in the vessel as Mr. Christenson did, and therefore felt that he had no further interest in the matter, but it is the fact that the master has not been an owner in the vessel for at least eight years past, and the vessel's ownership record so shows. It is an unfair

suggestion that he was not telling the truth at the time he testified.

We do not desire to conclude and allow the impression to be entertained by the Court, that Judge Detrick, because of limited time did not give this matter full consideration, for, as the record will show, the matter was before him in the nature of a rehearing. Furthermore, the matter of the final decree as to the question of the proportion of the judgment which each individual respondent should bear, was presented to his Honor through correspondence in his jurisdiction in Boise, Idaho.

It will therefore be seen that time was had for mature consideration.

CONCLUSION.

We are sorry to find that an appeal is made on the basis of sympathy, and while it is only natural that one's feelings should go out to persons who have had a misfortune, nevertheless, there is nothing gained by attempting to have those who are not responsible for the misfortune, answer for it. As said by the Court in *The Serapis,* in 51 Fed. 93, and heretofore quoted by us:

> "Libelant's misfortune has our deepest sympathy, but to do injustice through sympathy for the injured is to do away with law, and make recovery for loss dependent on the tenderness or want of it in the feelings of the court."

We respectfully submit:

As stated in the opening of this brief no cause of action lies in libelants because the action is not brought within the time fixed by the State Statute. Further the action is not of admiralty cognizance because the right of action was consummate on land.

We further submit:

1. That the respondents had done all they could possibly do for the proper equipment of the vessel, and she was in fact equipped with slings generally and usually used.

2. That if there was any negligence, the negligence was that of a fellow-servant, the mate, for which the respondents are, in law, not liable.

3. That the deceased is shown to have been an experienced stevedore, the mate of vessels, and fully acquainted with all the hazards of his calling, the risks of which he assumed.

4. That the deceased failed to take the usual precautions which were followed by some of his fellow-employes, and failed to exercise due care to keep a lookout until danger was past, and is chargeable with contributory negligence in advancing under the load before it had been safely landed. Further, that if the statements of the libelants' witnesses are correct, he was warned of any peculiar hazard that it is claimed is attached to the use of a single turn, and it was of a consequence, his duty to quit, failing which, he assumed the risk.

No right of action existing in appellants and further, this appeal being a trial de novo, we respectfully submit that the judgment of the lower Court should be reversed, and that the libel should be dismissed.

Dated, San Francisco,
February 1, 1921.

Respectfully submitted,
NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellees.

No. 3542

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, infants, by their guardian and *Prochein Ami*, HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Appellants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, JR., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON CO., a corporation, ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Appellees.

REPLY BRIEF FOR APPELLANTS.

ANDROS & HENGSTLER,
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Appellees.

REPLY BRIEF FOR APPELLANTS.

I. AS TO APPELLEES' STATEMENT.

1. The statement that

> "It is without dispute that chain slings were on board the vessel in addition to the rope slings used" (3)*

is incorrect.

The testimony shows that chain slings were used when the lumber was *loaded* (12).

There is no evidence that the chain slings used in *loading* lumber belonged to the ship or remained on board. Assuming that the vessel was provided with chain slings, it would have been obviously fitter, cheaper and safer to use them than rope slings, which wear out; the fact that insufficient rope slings were used when the fatal accident occurred justifies the inference that any chain slings used in *loading* were provided by the loading mill, and were not on board this vessel. The mate laid out the slings which he found on board, and which the court below found insufficient; of course the men picked out the particular slings from among those provided by the vessel; but the testimony showed, and the court found, that respondents failed to *provide* slings long enough for a double turn.

2. The statement that

> "As the vessel was at the time lower than the wharf, it is evident the load *never cleared the vessel*" (4)

is incorrect.

*Pages refer to Brief for Appellees.

The load was hoisted from the deck to the level of the wharf. The master's story is:

> "And everybody was out of the way, all walked away, and the load *swung in to the wharf.* When it *came in to the wharf* the donkey man didn't let it go; he could have let it go, but he kind of held on, *and the load swung back* * * *" (24)

It therefore appears from the testimony of the only eye-witness produced by respondents that the load, after having been raised from the lower level of the deck to the higher level of the wharf, *"swung in to the wharf"*, and that the dangerous situation did not *begin* until then, *"when it came in to the wharf"*. He testifies that afterwards, for a reason specified by him, "the load *swung back"*. It appears clearly that, after it had swung back, some of the load *fell into the water.* This, of course, happened, *before* it had *returned* to the deck.

How is it possible for respondents to assert, in the face of their own evidence, that "the load never cleared the vessel"?

II. AS TO CONTENTION BASED ON CALIFORNIA STATUTE OF LIMITATIONS.

In the course of the trial appellees marshaled every technical doctrine of the common law (assumed risk, not pleaded; fellow servants, not pleaded; contributory negligence). Two new defenses appeared at the hearing in this court, no previous hint having been given either in the pleadings or at the trial. The first of

these alleged defenses is that the libelants have no cause of action because their action was not commenced within one year. The second alleged defense is that the court has no jurisdiction, the deceased having died on shore.

As to the latter defense, we understand that it was abandoned at the oral argument, at the suggestion of the court. It is settled that the *locus injuriae* is the locus of the jurisdiction.

As to the first alleged defense, a sufficient answer is that it comes too late. It was not pleaded by respondents. During the long course of this litigation respondents have admitted right along what they now deny, viz: that it was incumbent upon them to make a defense to libelants' action. Is it not too late now to say that libelants have no good cause of action?

However, it is not necessary to travel outside Appellees' Brief to prove that there is no merit in the contention. The contention rests upon a quotation from *Hughes on Admiralty* which maintains that the alleged restriction of the right to sue is binding in admiralty courts only in that type of legislation where it is "*embodied*" in the state statute based upon Lord Campbell's Act (5) and is "a *condition* on which the right is given" (6). Mr. Hughes recognized expressly that the rule referred to is different in that second type of cases where the restriction is contained in "*a statute of limitations*"; that, in the latter case, admiralty courts are not bound. His comment is founded upon the *Stern* case, of which the New Jersey statute forms

the basis. The latter statute contains a *proviso in the body of the Acts* "provided that every such action shall be commenced within twelve calendar months"; it therefore belongs to the first type. The same is true of the statute in the "Harrisburg" case. Mr. Hughes' criticism of the *Garcia* case, decided by this court, is predicated upon the reservation: "unless the California statute differs from the usual form of *these* statutes." Now, Mr. Hughes' opinion would not be the law of this court even in case he differed; but in fact he does not differ; for the California statute does differ from the type to which his remarks are directed. The limitation of one year is not a proviso of the death statute, C. C. P. Sec. 377; it is found in an entirely different section of the code, C. C. P. Sec. 340, the general statute of limitations. Mr. Hughes could not say: "This is not a statute of limitations"; he would agree: "This *is* a statute of limitations, and therefore my remarks do not apply to it or to any case based upon it."

On principle the situation under the California statutes is this:

Section 377 gives the right of action without condition.

Section 340 provides: If you desire to enforce this right of action in a California court, you must commence suit within one year.

This leaves it open to parties who have the right under Section 377 to enforce the right in a court of admiralty, which is not bound by the State statute of limitations. Excellent reasons are given by this court

in the case of *Western Fuel Co. v. Garcia,* 255 Fed. 817, 820, for its decision that the statute of limitations has no application.

The suggestion of appellees that the court postpone the decision of this case until the United States Supreme Court decides the *Garcia* case (7) is in line with other endeavors to secure delay. While appellees could only gain by such a course, it might work irreparable hardship upon appellants by the possibility of the decease of responsible appellees and the consequent abatement of appellants' action against them. It appears that the question here raised was not certified to the Supreme Court at all, and that, therefore, no light will be thrown upon it, presumably, by the eventual decision in that court. Under the circumstances it would, in our opinion, be in consonance with principles of justice to have this case take its regular course under the law as it now stands.

III. AS TO THE EVIDENCE (9-14).

The District Court has found that respondents failed to provide slings long enough for a double turn. This court, we are confident, will not be inclined to disturb this finding.

Respondents' witnesses Fitzgerald and McDonald were San Francisco stevedores who knew nothing of the facts of this case, but were called as "*experts*" to show that rope slings were "usual and customary". Even if their testimony is accepted, it shows at best

what the custom was at San Francisco, but does not show what was "usual and customary" at San Pedro, the place where James Flynn was killed. The third stevedore who was called as an expert by respondents (McPhee, Apostles p. 176) testified, in answer to the leading question asked by counsel for respondents, as follows:

> "Q. In regard to the method of discharging lumber by means of a rope sling, state whether or not, in your experience, as far back as 1903, it was usual and customary to discharge lumber with a single turn as well as with a double turn.
>
> A. *No, I don't think it was.* I always used double turns" (Ap. pp. 176-177).

This during an experience of twenty years.

In spite of this testimony by his own expert counsel states:

> "It is undisputed that rope slings were in common use, and that a single turn, in the discharge of lumber cargoes, *was usual*" (22).

Counsel's comment upon Baker's testimony (13) as to single turn slings is obviously unfair, as the record shows. Baker sums up his views as follows:

> "A. My candid opinion is that it is not a safe way and if it was my vessel I would make them take two turns.
>
> Q. Your reasons for that are what?
>
> A. I think it is not safe—the lumber is apt to slip out" (Ap. p. 123).

IV. AS TO CONTRIBUTORY NEGLIGENCE.

The master's version of the accident is alone sufficient to exonerate the deceased from this charge. Coun-

sel in this connection refers to Cainan's testimony (25), apparently intimating that it would aid appellees' theory. But this testimony confirms clearly the master's version. He recites that, after the load had been hoisted high enough and come back, "it struck the stringer of the wharf."

In answer to Mr. Frank's question he testified as follows:

> "Q. Now, as I understand you, this *had passed clear over the vessel and over to the wharf*, and *then struck the wharf* and most of the load fell in between the wharf and the vessel into the water?
> A. Most of the load fell between the wharf and the vessel's side" (Ap. p. 64).

Nevertheless counsel now argue that "it never was clear" of the deck (25).

When Flynn returned to his work

> "he was there because his employment required it; and that he believed himself safe is manifest from the fact that he was there. Men do not voluntarily incur unnecessary risk."
>
> (Butler, J., in *McGough v. Ropner*, 87 Fed. 535.)

V. AS TO ASSUMPTION OF THE RISK (16-24).

The answer to appellees' argument on this point is:

(I) This defense is not pleaded.

(II) Assuming it to apply, the deceased had *not* agreed to assume the risk of having loads come back to the deck after they had swung on to the wharf.

There is no evidence that such a risk was apprehended by the deceased or could have been reasonably anticipated.

(III) Judge Dietrich found that "the long timbers slipped out *after* the load had reached the wharf railing, a casualty which is not shown by the evidence to be of frequent occurrence." In fact there is no evidence that the casualty of timbers slipping after the load had reached the wharf railing was a danger to be apprehended by the men on board. They had a right to feel safe at the time.

(IV) There is no evidence that the protests made to the officers as to the single turn were known to deceased. Even if this particular risk was appreciated by him, it had terminated as a risk to be anticipated after the load had swung out to the wharf. The instant case is different from *The Scandinavian,* cited by respondents (19-20), where libelant took chances on using a ladder which he *knew* to be broken and dangerous. Flynn did not know that the fatal load would return to the deck after it had passed to the wharf.

VI. AS TO THE FELLOW-SERVANT DEFENSE.

This defense, like the preceding one, is an after thought.

(I) The defense is not pleaded.

(II) On the contrary, the respondents, in their answer, "deny that the *officers or agents* of said vessel

in charge of the hoisting of said lot of lumber from said hold were careless or negligent in the manner of hoisting the same, or in the means employed by them for so doing" (Answer X, Ap. p. 17). Respondents are therefore estopped from now claiming the contrary.

(III) Assuming negligence of the mate, such negligence was not the causa causans of Flynn's death. That cause was the breach of "the non-delegable duty of the respondents to take reasonable care in providing safe appliances" (187). It was still operating as the efficient cause at the time when the mate "held on" and the bundle, in consequence thereof, struck the railing of the wharf. Judge Dietrich found that "it is difficult to see how such an accident could have occurred if the double turn had been employed", and that "failure to provide slings long enough for a double turn constituted negligence" (188).

In *The Joseph B. Thomas*, 81 Fed. 578, Judge Morrow said:

> "It is also another rule of the law of negligence that the employer is liable for the *concurring* negligence of himself and a fellow servant of the injured employe to the same extent *as if the injury had been caused entirely by his own negligence.* * * * The same rule prevails in admiralty."

It may be said in passing that the last cited case involves principles very similar to those involved in the instant case; that these principles are very thoroughly discussed in that case and have been followed by other courts. The instant case falls plainly within the class of cases referred to by Judge Morrow, "where

the act of injury itself, in connection with other facts and circumstances, sufficiently establishes that there was negligence to justify a judgment for damages.'' The unloading is shown to have been under the management of appellees or their servants, and the accident was such as, in the ordinary course of things, does not happen if ordinary care is used by those having the management.

The *Thomas* case also affords support to appellants' argument that the failure of appellees to call as witness the mate raises a presumption that his testimony, if produced, would have been unfavorable to appellees. He represented the appellees directly in the discharge of the lumber; all the evidence shows that he was the chief actor in the drama; that he had been warned

> ''that somebody would get killed here yet with the slings. 'Oh!' he said, 'there are a lot more of Dutchmen! They killed an Irishman for a change'' (Deposition of Ehlert, Ap. p. 79).

VII. AS TO DAMAGES (31-40).

Appellees' contention is that the damages contended for by appellants are *''grossly excessive''* (32); that appellants are entitled to the ''cash value'' (33) of the life of the husband and father at the time when he was killed by the negligence of appellees; and that, ''under the facts of this case, and the principles announced by the court in its opinion, $2500 would be a large amount'' (40). Before discovering the cases cited in their brief, appellees had urged upon Judge Dietrich the suggestion that he follow the analogy of

the cases in the courts of the State of California; finding afterwards that the "cash value" of a human life in California is so much higher than the $2500 which "would be a large amount", appellees are silent as to the California decisions. We have no fear that the judgment of this court in favor of this widow, whose struggle, single-handed, for her own and her children's existence did not allow her time to attend to her law suit until after the children were all self-supporting, will be on the basis of a niggardly "cash value" of the life of her dead husband, even though he was merely an humble laborer, gaining a modest livelihood for his family.

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VIII. AS TO PROPORTIONATE LIABILITY OF PART OWNERS (40-43).

Appellees' argument overlooks the fact that *prima facie* each appellee is liable, as part owner of the vessel, for the failure to supply safe or proper slings. The statute limiting his liability applies only *in the absence of knowledge or privity* on his part. To support a claim for the benefit of the statute, the *burden of proof is upon the appellee* claiming it, to show that he was without privity or knowledge in the matter. It is not incumbent upon the appellants to show that each appellee had knowledge.

IX. AS TO THE MASTER AND E. A. CHRISTENSON.

(a) *As to the master:* Judge Dietrich found that this is a case

> "where the *master is negligent* and continues to require the use of an inadequate or defective appliance after its insufficiency has been called to his attention" (Ap. 188).

This finding is supported by the evidence. Contrary to counsel's assertion (45), the name "Hansen" *is* "the earmark that indicates that he (Buckley) *did*" speak to the master whose first name was "Hans".

Mr. Christenson's deposition, taken pursuant to the order of this court, shows that the master is Hans J. Lunvaldt, one of the respondents, and was the owner of 2/32nds of the schooner at the time of the accident (Deposition of E. A. Christenson, p. 2).

(b) *As to Mr. Christenson:* Mr. Christenson testified that he was managing owner of the schooner until March 3, 1903 (p. 4). That, on the latter date, he sold his remaining interest to Sudden & Christenson, a corporation, of which he was president (p. 5). He was also owner of 50% of its stock (p. 6).

His contention that he was *not* managing owner of the vessel on August 3, 1903, the date of the accident, rests upon his claim that he was then *not* an owner, having sold his interest to the corporation. It is submitted that he is estopped from making such a claim, for the following reasons: His name heads the list of respondents in the suit brought in 1903; this ordinarily indicates that he was the managing owner (Deposition, p. 10); the writ was served personally upon him (Ap. p. 3); respondents' answer is sworn to by him, "*for Self and Co-owners*" (Ap., p. 18; Deposition, p. 2).

"Q. Whose handwriting is 'E. A. Christenson, for Self and Co-owners'?

A. My handwriting.

Q. The whole, 'E. A. Christenson, for Self and Co-owners', is in your handwriting, is it not?

A. Yes.

Q. And you swore to this?

A. On the 13th day of May, 1905, yes."

The answer thus sworn to is styled: "The answer of E. A. Christenson", etc., and does not deny the allegation "that said defendants" (headed by E. A. Christenson) were joint owners of the schooner. Thereafter Mr. Christenson was present at the taking of the depositions of the sailors (Deposition p. 11), from which the inference may be drawn that he at any rate considered himself the managing owner of the vessel. In 1920 a decree, prepared by his counsel, was entered against the respondents, "E. A. Christenson, owner of 2/32", heading their list (Ap. p. 196). During seventeen years and down to October, 1920, Mr. Christenson had admitted that he was the owner of a 2/32 interest in this vessel and assumed the burden of such ownership.

We submit that he cannot deny ownership at this late date; that his function of managing owner continued to and beyond the date of the accident, and that he is *ipso facto* charged with the privity and knowledge of a managing owner.

His testimony also discloses that *Sudden & Christenson,* a corporation, were owners of a 2/32 interest in the schooner on the day of the accident (Deposition, p. 3). We submit that the final decree ordered by this

court should include this corporation as a respondent liable to libelants. The corporation still exists (id.).

It is further suggested that even under the theory that Mr. Christenson's interest passed to Sudden & Christenson before the date of the accident, the latter corporation became the managing owner of the vessel. Hence both the corporation, and Mr. Christenson as its president, were charged with the privity and knowledge which prevents any limitation of liability in their cases.

Dated, San Francisco,
February 16, 1921.

Respectfully submitted,

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants.

No. 3542

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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Appellants,

vs.

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Appellees.

APPELLANTS' PETITION FOR MODIFICATION OF OPINION AND DECREE.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Kohl Building, San Francisco,
Proctors for Appellants and Petitioners.

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Appellees.

APPELLANTS' PETITION FOR MODIFICATION OF OPINION AND DECREE.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of the appellants above named for a modification of the opinion and decree of this honorable

court filed and entered herein on the 2nd day of May, 1921, so as to allow the appellants to recover the costs of their appeal, respectfully shows:

I.

That on May 1, 1920, a decree was entered in this cause by the United States District Court for the Northern District of California in favor of appellants (libelants) for the sum of $6500; being damages for the wrongful death of the husband and father of the appellants (Record p. 194).

II.

That the District Court, in making the award, found that in the death of the husband and father the appellants had suffered a loss of $13,000, but also found that the deceased had been guilty of contributory negligence, and upon that ground held that the damages should be divided, and fixed the amount of the recovery at $6500 (Record p. 194).

III.

That the appellants appealed to this court from the decree entered by said District Court, and assigned as errors, among others, the following:

"V.

"The court erred in holding the deceased chargeable with a want of due care.

"VI.

"The court erred in dividing the damages by reason of the want of any or all due care on the part of the deceased, and in dividing the damages at all.

"XIII.

"The court erred in dividing the amount of $13,000, and giving to the libelants an award only on the basis of a total of $6,500" (Record pp. 200, 201).

IV.

That thereafter this cause came on for hearing in this court and was argued by counsel for appellants and appellees and briefs were filed in behalf of said parties; that in the argument by counsel for appellants and in the briefs filed on behalf of appellants it was urged that the District Court had erred in the matters set forth in said assignments of error, that there was no evidence to support the finding of contributory negligence and that the award should have been for $13,000, the full amount of the damage, instead of for one-half of said sum, or $6500.00.

V.

That in said opinion filed by this court on the 2nd day of May, 1921, this court found that "the conclusion reached by the trial court regarding the alleged contributory negligence of the deceased is not justified by the record", and held that the decree must be modified so as to allow the appellants to recover the sum of $13,000, instead of the amount awarded by the District Court, $6500, and as so modified the decree should be affirmed.

VI.

That no provision was made in said opinion for the recovery by appellants of their costs of this appeal.

VII.

That under Subdivision 2 of Rule 31, of the rules of this court, the effect of the affirmance of the decree of the District Court without any allowance to appellants of their costs on appeal, is to deny to the appellants the right to recover such costs and to permit the appellees to recover their costs on this appeal.

VIII.

That appellants have expended and incurred a large sum of taxable costs on this appeal, in excess of the sum of $450.00, which they will not be able to recover from the appellees, unless this court so modifies its opinion as to permit the appellants to recover their costs on appeal; and unless said opinion is so modified, appellants will be liable to pay the appellees' costs on appeal.

IX.

Your petitioners recognize that the allowance of costs is a matter within the discretion of this honorable court, and respectfully submit that it is manifestly inequitable and unjust to appellants, in view of the errors urged by them on this appeal, and the decision of this court in their favor, which increased the amount of appellants' recovery from $6500 to $13,000, that appellants should be taxed with the costs of their appeal and be obliged to pay the appellees' costs.

X.

That the opinion of this court is a substantial modification of the decree of the district court, which warrants the allowance of costs to appellants.

Wherefore your petitioners pray that this honorable court will be pleased to so modify its said opinion filed and entered herein on May 2, 1921, as to permit the appellants to recover their costs on this appeal.

Dated, San Francisco,
May 25, 1921.

Respectfully submitted,

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants and Petitioners.